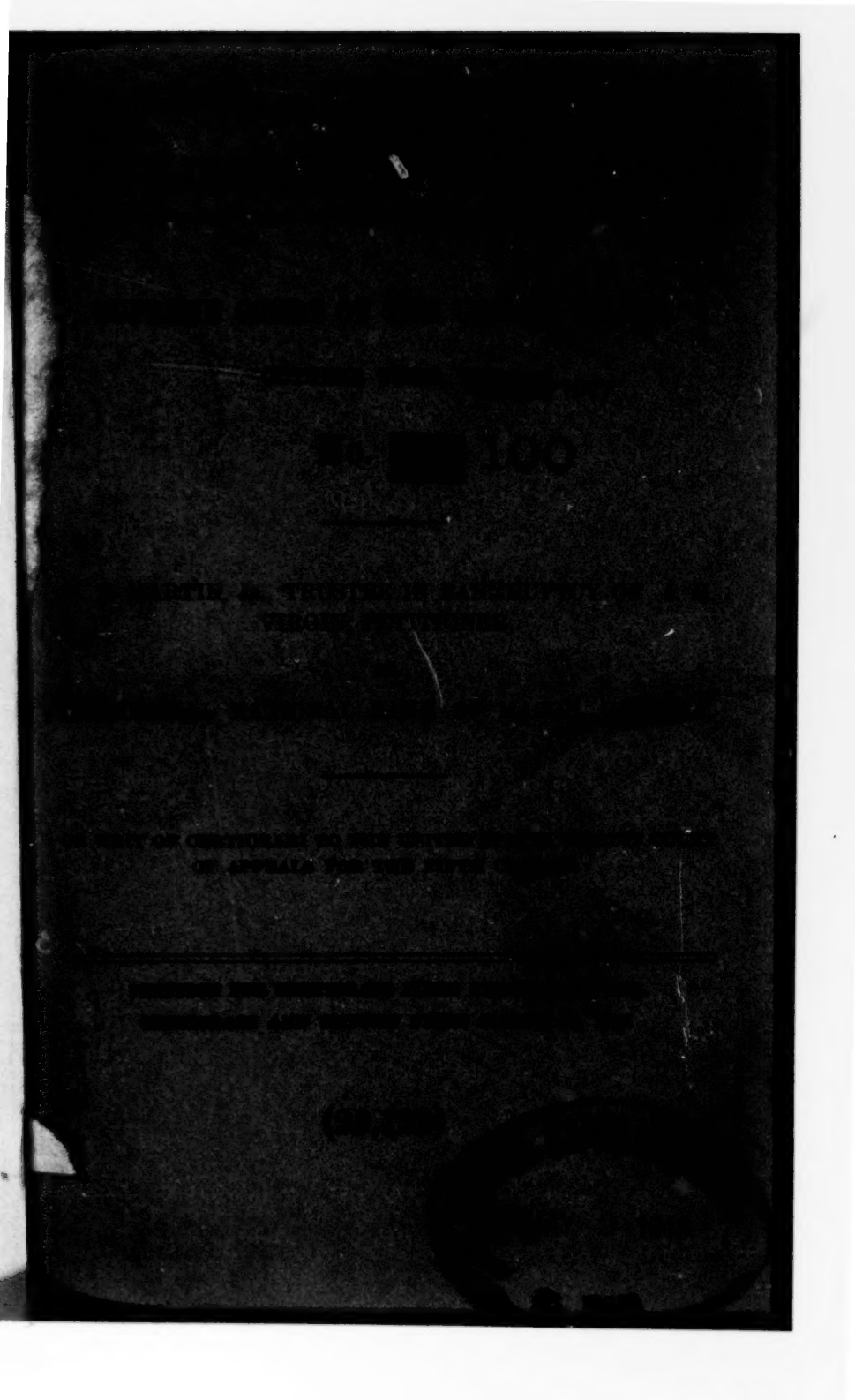

# (25,122)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1916.

# No. 373.

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W. E. MARTIN, JR., TRUSTEE IN BANKRUPTCY OF J. H. VIRGIN, PETITIONER,

*vs.*

COMMERCIAL NATIONAL BANK OF MACON, GEORGIA.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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25

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | a | 1 |
| Transcript of record from the district court of the United States for the southern district of Georgia | 1 | 2 |
| Caption | 1 | 2 |
| Certificate of referee on petition for review of order allowing secured claim of Commercial National Bank | 2 | 2 |
| Findings and opinion of referee | 4 | 3 |
| Order of referee overruling objections to allowance of secured claim | 11 | 8 |
| Summary of evidence | 11 | 8 |
| Testimony of J. H. Virgin | 11 | 8 |
| Nat Lewis | 14 | 10 |
| J. H. Virgin (recalled) | 27 | 18 |
| J. J. Cobb | 28 | 19 |
| J. H. Virgin (recalled) | 29 | 20 |
| R. J. Taylor | 38 | 25 |
| W. E. Martin, Jr. | 39 | 27 |
| J. H. Virgin (recalled) | 41 | 28 |
| J. M. Deborde | 42 | 28 |


---

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1916.

| | Original. | Print |
|---|---|---|
| Brief of documentary evidence | 44 | 30 |
| Original claim of Commercial National Bank | 45 | 30 |
| Mortgage, J. H. Virgin to Commercial National Bank | 47 | 31 |
| Objections of J. P. Stevens Engraving Co. to proof of secured claim | 49 | 33 |
| Petition of W. E. Martin, Jr., to be made a party to objections and order allowing same | 52 | 35 |
| Petition of Wm. Bens Co. *et als* to be made parties to objections and order allowing same | 52 | 35 |
| Objections of W. E. Martin, Jr., trustee, *et als.* to proof of alleged priority | 54 | 36 |
| Petition of W. E. Martin, Jr., trustee, *et als* for review of order of referee allowing secured claim | 56 | 37 |
| Opinion of the court on petition for review | 61 | 41 |
| Decree on petition for review | 66 | 44 |
| Praecipe for transcript of record on appeal | 67 | 45 |
| Petition for appeal by Martin *et al.* and allowance | 69 | 46 |
| Bond on appeal | 71 | 47 |
| Assignment of errors | 73 | 49 |
| Petition for appeal by Commercial National Bank and allowance | 77 | 51 |
| Assignment of errors on appeal of bank | 79 | 53 |
| Agreement as to transcript | 82 | 55 |
| Clerk's certificate | 83 | 55 |
| Order of argument and submission | 84 | 56 |
| Opinion, Walker, J. | 85 | 57 |
| Judgment | 89 | 59 |
| Clerk's certificate | 90 | 60 |
| Writ of certiorari and return | 91 | 60 |

a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A. D. 1915, at Atlanta, Georgia, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Rufus E. Foster, District Judge.

W. E. MARTIN, JR., Trustee, et als., Appellants and Cross-appellees,
versus
COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellees and Cross-appellants.

Be it remembered, that heretofore, to-wit, on the 4th day of August, A. D. 1915, a transcript of the record of the above
b styled cause, pursuant to an appeal and cross-appeal from the District Court of the United States for the Southern District of Georgia, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2816, as follows:

c TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2816.

W. E. MARTIN, JR., Trustee, et als., Appellants,
versus
COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellee,

and

COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellant,
versus
W. E. MARTIN, JR., Trustee, et als., Appellees.

Appeal and Cross-appeal from the United States District Court for the Southern District of Georgia.

[Original record filed Aug. 4, 1915.]

U. S. Circuit Court of Appeals. Filed Sep. 8, 1915. Frank H. Mortimer, Clerk.

1 In the District Court of the United States for the Western Division of the Southern District of Georgia.

In Bankruptcy. #1437B.

In the Matter of J. H. VIRGIN, Bankrupt.

W. E. MARTIN, JR., Trustee, et als., Appellants,
and
COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellee.

Appeal from Order and Decree of June 22, 1915, Affirming Referee's Finding on Petition for Review.

R. D. Feagin & O. C. Hancock, Att'ys for Appellants; P. O. Address Macon Ga.
Geo. S. Jones, Orville A. Park, Bruce C. Jones, Att'ys for Appellee. P. O. Address, Macon Ga.

2 In Bankruptcy.

COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellant,
and
W. E. MARTIN, JR., Trustee, et al., Appellees.

Cross-appeal.

George S. Jones, Orville A. Park, Bruce C. Jones, Att'ys for Appellant; P. O. Address, Macon, Georgia.
Feagin & Hancock; Napier, Maynard & Plunkett; Mallary & Wimberly; Attorneys for Appellees. P. O. Address, Macon, Georgia.

*Certificate of Referee on Review of Order Allowing Secured Claim of Commercial National Bank.*

In re J. H. VIRGIN, Bankrupt.

To the Honorable Emory Speer, United States District Judge:

I, J. N. Talley, referee in bankruptcy in charge of this proceeding, do hereby certify:

That in the course of said proceeding an order was made and entered by me on the 3rd day of February, 1915, overruling the objections of the J. P. Stevens Engraving Company, Wm. Bens Company, et al.; and W. E. Martin, Jr., trustee of J. H. Virgin, bankrupt, to the proof of secured claim of the Commercial National Bank, and allowing said claim as a secured claim entitled to priority of payment out of the proceeds arising from the sale of the mortgaged stock of merchandise and fixtures of the bankrupt, the
3 original order, containing a statement of the case and my findings and conclusions, being hereto attached.

That the trustee and the objecting creditors feeling aggrieved at said order, filed on the 15th day of February, 1915, their petition for a review which was granted.

That a summary of the evidence upon which said order was based, as agreed upon by the parties, is hereto attached and the proof of claim of the Commercial National Bank the objections filed by J. P. Stevens Engraving Company, by William Benz Company et al., and by W. E. Martin, Jr., trustee, are handed up herewith.

That the question presented for decision is whether the mortgage attached to the proof of claim of the Commercial National Bank is a valid mortgage and as such the highest and best lien on, and entitled to a priority of payment out of the proceeds arising from the merchandise and fixtures described in said mortgage as having been conveyed by J. H. Virgin to said bank to secure certain indebtedness due by J. H. Virgin to the Commercial National Bank.

I hand up herewith, for the information of the Judge, the stenographic report of the evidence submitted at the hearing on the objections to the bank's claim, and all other papers relating to said claim.

Respectfully submitted, dated Macon, Georgia, this the 12th day of March, 1915.

J. N. TALLEY,
*Referee in Bankruptcy.*

4 *Secured Claim of Commercial National Bank. Objections of Trustee and Certain Creditors. Findings, Opinion and Order of Referee.*

In the course of the proceedings in the above bankruptcy case, the Commercial National Bank filed its claim for $7500.00, secured by a mortgage on the stock of merchandise, furniture and fixtures of the bankrupt. The Trustee and certain creditors having objected to the proof of said claim as a secured claim, a hearing was had before me at which evidence was taken and argument heard. After considering the evidence and arguments of counsel, I find as follows:

1. An involuntary petition was filed against J. H. Virgin, a jewelry merchant of Macon, on August 21, 1914. One of the petitioning creditors was the Commercial National Bank, which alleged that it was an unsecured creditor of Virgin to the amount of $8,899.00, the consideration being borrowed money. The petition alleged that Virgin was insolvent, and had within four months prior to the date of filing the petition, and while insolvent, made certain preferential transfers of his property, which constituted acts of bankruptcy.

Adjudication shortly followed, and W. E. Martin, Jr. was appointed Trustee. The stock of merchandise and fixtures realized at Trustee's sale $8,600. The notes and accounts are being collected by the Trustee, and will probably realize three thousand dollars.

2. On September 25, 1914, the Commercial National Bank filed its

claim for $7500.00. This being an additional claim to that above referred to. This indebtedness was evidenced by one note dated February 16, 1914, for three thousand dollars, one dated March 10, 1914, for three thousand dollars, one dated April 20, 1914, for five hundred dollars, one dated May 5, 1914, for five hundred dollars, and one dated May 19, 1914, for five hundred dollars making
5 a total of seventy-five hundred dollars, said indebtedness being secured by a mortgage executed by J. H. Virgin on February 16, 1914, covering his entire stock of merchandise and fixtures. The mortgage was given to secure the first note above referred to for three thousand dollars and other notes of Virgin up to $7500. Claim is now made for $7500 and interest from the proceeds arising from the sale of the mortgaged property. The mortgage while executed on February 16, 1914, was not recorded in the Clerk's office of the Superior Court of Bibb County until August 20, 1914, the day before the petition in bankruptcy was filed. It was then recorded at the instance of the American National Bank, which, as liquidating agent, had on or about August 1, 1914, taken over the assets of the Commercial National Bank, including the notes and mortgages of Virgin just described.

3. The circumstances under which the mortgage was given were briefly stated, as follows: In February 1914, Mr. Virgin was already indebted to the Commercial National Bank about eight thousand dollars, unsecured. This was five hundred dollars more than the "line of credit" allowed him by the bank. He owed the Central Trust Company five thousand dollars, secured by an assignment of his open accounts. The open accounts were in fact retained and collected by Mr. Virgin and the proceeds kept by him, but from time to time he would furnish the Trust Company with a list of open accounts which the assignment was supposed to cover. Mr. Lewis, Cashier of the Commercial National Bank, with whom Mr. Virgin dealt in this transaction, knew of the indebtedness to the Central Trust Company and had, in fact, negotiated the loan of five thousand dollars for him about two years previously. Mr. Cobb the Vice President of the Commercial National Bank, was President of the Central Trust Company at the time. Mr. Virgin was indebted to Mr. L. O. Stevens on the purchase price of the stock of merchandise which had been bought several years before from Mr. Stevens, in the sum of $2800.00, but Mr. Lewis states in his evidence
6 that he thought this indebtedness was only about one thousand dollars. At the time the mortgage was executed Mr. Virgin furnished Mr. Lewis, Cashier, with a statement of his liabilities. That statement is not produced, but it is easy from the evidence to estimate that his liabilities must have been at least $33,380.00, because it was understood that the seventy-five hundred dollars to be borrowed from the Commercial National Bank *was* to be used in paying merchandise creditors as their bills matured, and it now appears from the schedules and claims that merchandise creditors representing an indebtedness of more than ten thousand dollars, incurred before February 1914, are yet unpaid; that is to say, his indebtedness at that time may be estimated as follows:

| | |
|---|---|
| Central Trust Company | $5,000.00 |
| Commercial National Bank | 8,000.00 |
| L. O. Stevens | 2,880.00 |
| Creditors whose claims have been paid with proceeds of $7,500 loan | 7,500.00 |
| Creditors, unpaid, whose claims were in existence in Feb'y 1914 | 10,000.00 |
| Total | $33,380.00 |

The indebtedness above estimated does not take into consideration such other indebtedness as he may have paid from the proceeds of his sales of merchandise. Mr. Virgin testifies that in February, 1914, his stock of merchandise and accounts were worth about thirty thousand dollars. His only other asset of value at that time was a life interest in certain real estate which he now values at $200.00. Mr. Lewis, Cashier of the Commercial National Bank, and Mr. Virgin went over the affairs of the latter before the mortgage was executed, and it was believed by Mr. Lewis that Mr. Virgin was overstocked with merchandise and was using too much credit. Mr. Lewis, the Cashier, agreed to lend Mr. Virgin an additional sum of $7,500.00, secured by a mortgage on his
7 stock of merchandise and fixtures to be used in paying off his merchandise obligations as they matured, and it was believed by both that with this amount of money and the proceeds arising from the sales of merchandise, the merchandise creditors could, within a reasonable length of time, be paid off leaving the Central Trust Company and the Commercial National Bank practically Virgin's only creditors. It was further understood that Virgin was to reduce his stock of merchandise as rapidly as possible, that he was not to purchase on credit, and that he would pay cash for such articles as he needed from time to time to keep his stock replenished.

Mr. Virgin requested Mr. Lewis, Cashier, not to put the mortgage on record, but no agreement or promise was made by the bank, and it was not the expectation of Mr. Lewis that credit would be obtained by Mr. Virgin while the mortgage was being held off record. It developed that the seventy-five hundred dollars, advanced by the bank at the time the mortgage was executed and during the two months thereafter, was not sufficient to pay the outstanding indebtedness. About August 1, 1914, the affairs and assets of the Commercial National Bank were taken over by the American National Bank of which Mr. R. J. Taylor is President. Shortly before the bankruptcy petition was filed Mr. Virgin submitted a statement of his business to Mr. Taylor and sought to obtain credit from his bank, but credit was refused, and Mr. Virgin was advised that the mortgage would be put on record. The mortgage was recorded on August 20, 1914, and on the following day the involuntary petition was field by the Commercial National Bank, the affidavit to the petition being made by Mr. E. N. Lewis as Cashier. This

petition was filed by the direction of the American National Bank as liquidating agent of the Commercial National Bank.

4. During the period from February 16, 1914, the date of the execution of the mortgage, to August 20, 1914 when it was recorded, Mr. Virgin incurred an indebtedness of a few hundred dollars, probably not over four or five hundred; the exact amount
8 can probably be determined when all the claims against his estate have been filed. None of these creditors have testified that they would not have extended Mr. Virgin credit if they had known of the existence of this secret mortgage.

5. There was no purpose on the part of the Commercial National Bank in withholding the mortgage from record to bolster the credit of Virgin and enable him to obtain credit, the expectation of the bank being that he would not obtain credit during that period.

6. At the time the mortgage was recorded, to-wit on August 20, 1914, the said J. H. Virgin was insolvent and the said, R. J. Taylor, President of the American National Bank, in having said mortgage recorded, had reasonable cause to believe that the record and enforcement of such mortgage would effect a preference of the Commercial National Bank over the unsecured creditors of said J. H. Virgin and would enable the Commercial National Bank to obtain a greater percentage of its debt than any of the unsecured creditors of said J. H. Virgin.

7. The mortgage which purports to have been signed, sealed and delivered in the presence of J. M. De Borde, Notary Public, Bibb County, Georgia, was signed by J. H. Virgin at the bank and within about ten feet of the desk of J. M. De Borde, the Teller, and where the signing could be seen by Mr. De Borde. While the recollection of the parties is naturally indistinct, I am satisfied that it was either signed in the presence of Mr. De Borde, or was immediately after signing, handed to him in the presence of Mr. Virgin and was part of the one transaction whose regularity is determined by the act of the Notary.

8. Mr. De Borde, the Notary Public who witnessed and attested the mortgage, was in the employ of the bank as Teller, but was not interested as a stockholder, or otherwise. The expense incident to his commission as a Notary Public was defrayed by the bank and he made no charge against the bank for his services in witnessing its papers.

9 *Opinion.*

The mortgage is attacked first, on the ground that it was made to hinder, delay or defraud creditors. In order to sustain this attack, actual fraud must be shown (Lumpkin vs. Foley, 29 Am. B. R. p. 673). In the instant case, the bank parted with seventy-five hundred dollars, and took the mortgage to secure itself against loss. The object of the bank and Mr. Virgin was to prevent loss to his general creditors. While his credit at that time was strained, and he was in fact on the verge of insolvency, if not insolvent, the evidence discloses that both Mr. Lewis and Mr. Virgin believed

the latter to be solvent and, with the aid of the money secured under this mortgage, would be able to extricate himself from his financial difficulties. There is no evidence of any intent to hinder, delay or defraud Virgin's creditors, but an intent to help them and him. The mortgage is, therefore good as against this attack.

Nor, in view of the evidence, can it be said that the mortgage was withheld from record for the purpose of bolstering the credit of Mr. Virgin. The bank was endeavoring to curtail the credit of Virgin, not to increase it.

Another objection urged by the Trustee is that the mortgage having been recorded within four months prior to bankruptcy, and at a time when Virgin was insolvent and the bank having knowledge of such insolvency, and knowing that by recording such mortgage it would obtain priority of payment over the unsecured creditors of Virgin, such mortgage is voidable as a preference by the Trustee under section 60*b*.

There is no doubt but that the effect of recording this secret mortgage is to give the bank priority of payment and enable it to receive payment of its claim in full, thereby leaving nothing for distribution to the unsecured creditors whose claims aggregate $26,000. In order to obtain this advantage the bank was required by the law of Georgia to record this mortgage before the bankruptcy of Virgin, else the Trustee's title would have been superior, and the bank would only have shared pro rata with other creditors holding no security.

To use the language of the Counsel of the Trustee: "The question is whether a mortgage given anterior to the four months' period preceding bankruptcy, but recorded within this period and at a time when the bankrupt is insolvent, and when the mortgagee has reasonable cause to believe that he is insolvent and that he (the mortgagee) is therefore receiving a preference, is voidable by the Trustee. The proposition of the Trustee is that the recording of the mortgage at this time, and under these conditions, is a voidable-preference, just as the execution of the mortgage within this period would be, there being no present consideration in either case."

In my opinion the reasoning of the District Courts of Georgia and of the Circuit Court of Appeals for this Circuit in several cases has concluded this question against the contention of the Trustee, if indeed, the exact question has not been decided by these Courts. The Circuit Court of Appeals of the Fifth Circuit in Meyer Brothers Drug Company vs. Pipkin Drug Company, 14 Am. B. R. p. 477, construing the registration statutes of Texas which are substantially the same as those of Georgia, held:

"In Texas failure to record a chattel mortgage renders it void only as against lien creditors of the mortgagor, or subsequent purchasers and mortgagees or lien holders in good faith, and its recording is not "Required" within the meaning of section 60*a* of the Bankruptcy Act, 1898 as amended in 1903, in order to make it valid as against the mortgagor's trustee in bankruptcy, and when executed and delivered anterior to the four months' period, but re-

corded within such time, it does not constitute a preference under said section."

It is true this decision was before the amendment of 1910 giving the trustee the rights of a judgment creditor, but it would seem to be applicable now, because the title of the trustee does not vest until after bankruptcy, and the trustee's title, therefore,
11 would be inferior to the lien of a mortgage recorded prior to bankruptcy.

Other cases decided since the amendment of 1910 are: Jacobson vs. Perrill (Judge Newman) 29 Am. B. R. p. 603, following the decision of the Circuit Court of Appeals in Keeble vs. John Deere Plow Co., 190 Fed. p. 1019; and the decision of the Circuit Court of Appeals in Anderson vs. Chenault, 30 Am. B. R. p. 349, affirming Judge Speer.

*Order.*

It is, upon consideration, ordered that the objections of the Trustee and creditors to the proof of secured claim of the Commercial National Bank be, and they are hereby overruled, and said claim is hereby allowed as a secured claim, entitled to payment in full out of the proceeds arising from the sale of the stock of merchandise, furniture and fixtures described in said mortgage, and sold by the Trustee of the above bankrupt. This February 2nd, 1915.

J. N. TALLEY,
*Referee in Bankruptcy.*

Filed Feb. 3rd, 1915.

*Summary of Evidence.*

Mr. HOLT VIRGIN, sworn, testified:

My name is J. H. Virgin. I am the J. H. Virgin named as the bankrupt in this proceeding. I signed the mortgage dated February 16, 1914. The consideration to the Commercial National Bank for that mortgage was seventy five hundred dollars. I don't know what date the consideration to me bears. We got three thousand dollars at one time and three thousand at another time, and three notes of five hundred dollars each; I don't remember the
12 date that each note bears. All of it was not gotten at the same time. I got three thousand dollars in actual money at the date this mortgage was executed. I did business with the Commercial National Bank. They were familiar with my business affairs. They had a statement I had given them as to my financial condition. I gave them a correct statement. I think I gave it to Mr. Lewis. The status of my business at the time I gave them this statement was all right; at that time we were solvent. I don't remember the exact amount we owed at that time. When the mortgage was given we talked over about the loan and getting the money. I don't remember whether anything was said about its being recorded at that time or not. I think I asked them not to record it if they could possibly keep it off the record. That is my

best recollection, I don't remember exactly whether I did or not, but there was no promise made me at that time that it would not be recorded. Naturally I didn't want it recorded. It might have affected my credit to a certain extent if it had been recorded. In reference to my purchases I was doing both a cash and a credit business. I did a large credit business in my purchases. I had a good deal of credit extended to me. I had no mortgages outstanding that had been recorded at that time. I stated the facts as to the condition of my business to Mr. Lewis. He was Cashier of the Commercial National Bank. My negotiations as to this transaction were with him. I mean the original three thousand dollar note was dated February 16th and due August 16th. That note was not paid August 16th, 1914. I don't remember what other debts I owed at the time this mortgage was given. I can't tell you the amount right now. That three thousand dollars was not sufficient to pay all that I owed. The Commercial National Bank had a statement of my indebtedness at that time, I didn't tell them anything, the statement showed what the condition was. I gave them a statement, a list of the accounts that I owed. As to the statement, I told them that that was just what I was due; I wanted to get money enough to pay them up; I wanted to keep them off for, a
13 while. I told them that I wanted to get money enough to pay up those accounts that were due at that time. I think I have made debts since that time that have not been paid. I did not keep a copy of the list that I furnished them. I think I gave the list to Mr. Lewis, Mr. Nat Lewis. In the conversation with Mr. Lewis I don't remember right now whether I discussed the statement as to what was due with him or not. I don't think I ever had a talk with Mr. Lewis, or any other officer of the Commercial National Bank about my condition after the giving of this mortgage. The five thousand dollars that I got through the Central Trust Company came through the Commercial National Bank. It came through Mr. Lewis; I got the money through him. That was about two years prior to this bankruptcy petition; I don't remember the exact date. I had never paid this indebtedness. I don't remember exactly what conversation I had with them in reference to their not recording this mortgage; I think I asked them if they could do it not to; there was no promise made me that they would not. I don't think they recorded it prior to my bankruptcy.

Examined by the Referee:

I don't remember what Mr. Lewis said when I asked him not to record it; there was no promise made at all. I don't think there was anything at all said by him. I told Mr. Lewis if he could keep it off record I would be glad if he would do so. He did not make any objection to my request at that time, nor at any other time. He never did tell me that he would not grant my request. I did not continue to get money from him after that, only the amount this mortgage covered. I think it was five notes, up to the amount of seventy-five hundred dollars.

14 Mr. NAT LEWIS, sworn, testified:

On February 16, 1914, I was cashier of the Commercial National Bank. On that date I had occasion to have a business transaction with Mr. J. H. Virgin in which that mortgage was executed by Mr. Virgin. I don't remember at the time the mortgage was executed whether Mr. Virgin made a statement to me as to his financial condition or not, or whether he gave me a written statement as to his assets and liabilities. I haven't such a statement in my personal possession if he gave me one, the bank's files will probably show it. I don't know whether I could find that statement if it is in existence now. I have had nothing to do with the bank's files of late, have had no occasion to keep up with them. I don't remember the existence of the statement, and don't know whether I could find it or not. I don't know just how to answer about the statement because the statement is something I never charged my memory with. Just at this time I can't say anything about the statement. This mortgage speaks for itself. It was given to secure some money we loaned Mr. Virgin. We loaned it to him; he said he wanted it. We loaned it to him secured by this mortgage. I knew at the time he owed debts he didn't have the money to pay right then, that is why he made this loan. The loan didn't cover all the indebtedness that he owed; he owed more money than seventy-five hundred dollars. I don't recall everything in reference to the conversation as to whether I should record the mortgage or not. I know this, that there was nothing ever said by me to him that we would not record it. In fact, I can testify that, because that is a statement we never made to anybody that ever executed a mortgage to the bank. I can't recall whether Mr. Virgin asked me not to record the mortgage I think Mr. Virgin testified to that just a minute ago. That is his recollection. I myself don't remember that part of the conversation at all. I can not say positively that he asked me to keep it off the record. If he said he did, I am satisfied he asked me that, but I don't remember him asking it. I did hold the mortgage without record-

15 ing it until August 20, 1914. That was after the liquidation of the Commercial National Bank and when its affairs were in the hands of the American National Bank, the liquidating agent. So that so far as the Commercial National Bank is concerned they did not record that mortgage at all while the Commercial National Bank was a going concern. It was put on record after the American National Bank took charge of it as liquidating agent. I recall my motive for not recording that mortgage, and in order to make it clear to you, I would like to tell you my ideas about Mr. Virgin at the time we had this transaction with him. Mr. Virgin came into the bank and in talking over his affairs with me, he needed three thousand dollars at that time to meet some maturing obligations. I think this mortgage shows that—I am refreshing my memory from the mortgage—we loaned him three thousand dollars which we hoped would be sufficient to take care of his maturing obligations, but while we were drawing the mortgage we drew it so as to include other money in case he had to have

it. Now, I don't think at the time Mr. Virgin talked to me he really realized his own condition. I didn't. It seems now he was broke. I don't think he believed it. I didn't either; but it was his idea and mine that his stock of merchandise over there could be largely reduced and his accounts receivable could be largely reduced and he could be put on a basis where he would not have to use anything like the amount of credit he was then using, and we both believed with the use of seventy-five hundred dollars at most, and probably less that he, with the other income from the conduct of his business, could clear up his outside indebtedness and owe practically nobody but the Commercial National Bank and the Central Trust Company any money, and that he would have no trouble then after getting us to be his only creditor—The Commercial National Bank really and the Central Trust Company, and we being properly secured, that he could then reduce his indebtedness to the bank. At the time of taking this mortgage it was his hope and it was our idea that we would be practically his only creditor within a
16 reasonable time. No, I did not know as a matter of fact that he would have to have credit for some little time until he could work his business up into that shape; the policy he was conducting his business on was that he was not going to buy any more merchandise of any consequence, no more than he could with ease pay cash for. I knew that he had outstanding creditors at that time. As to the effect the recording of this mortgage would have upon those creditors that he then owed, and upon any people from whom he desired to get credit if the mortgage was recorded, I didn't know how much merchandise he bought on credit after this mortgage was taken. I knew at the time it was given it was his idea to buy practically none, and just from my idea of his affairs I imagine the record will show that he bought very little merchandise on credit after the execution of this mortgage. I know it was his intention to buy very little but it may have been the demands of the trade as to certain lines of stock compelled him to do so. That part I don't know about. I have had considerable experience in the credit business and the effect that the recording of a mortgage would have upon the ability of the person to secure credit. Generally speaking I presume that the recording of a mortgage limits a man's credit. At the same time my own experience has been it does not eliminate it. At the time I took the mortgage Mr. Virgin was a customer of the Commercial National Bank. I think the fact is sustained by the credit we extended him that we did not desire to do anything to hurt him in any way, his credit, or his finances or his business, and that we wanted to help him. We were willing to do anything legitimate that we could do that would help him. I am prepared to say that if he requested me not to record that mortgage, as he says his recollection is, and asked me to keep it off the record if I possibly could, that this request would not have influenced me in any way in keeping the mortgage off the record. I think that I would probably have, if I had known it was an urgent matter with him to withhold it from the record, if anything, it would have had the opposite effect on me. If he had executed a

mortgage to the bank I would have looked upon it entirely
17 as the bank's affair as to the recording of it, and if he did speak to me, and of course he did no doubt, about the recording of it, I do not remember what I did say, or would say to him, but it would have been in effect that it was the bank's affair. I can't recall what I did say. As to what I said to him about the recording of the mortgage, I just said I don't remember the conversation. If you want me to make a hypothesis that he did ask me, want me to admit that, I could tell you what in effect I would have said. I don't remember the conversation in particular. I can just merely give you my reason why I did not record the mortgage as soon as it was given to me, or within a reasonable time: I didn't expect Mr. Virgin within a short period to be owing anybody except the Commercial National Bank and the Central Trust Company and I didn't see that there would be any necessity of recording it and I had strong hopes he would eliminate this part of his indebtedness secured by the mortgage. I will put it, that I believed that if I did record that those hopes would not be realized as effectually as if I did not record the mortgage. I believed that under favorable conditions he would be able to work out his business and get it in good shape. I did not fear that if I recorded the mortgage that those hopes would not be realized as effectually as if I kept the mortgage off the record; those hopes were contingent not on the withholding of the mortgage, but on the volume of business he would be able to do in reducing his merchandise. The principal reason of keeping the mortgage off the record was I didn't believe there was any necessity of recording it. Within my knowledge, the Commercial National Bank has taken a great many mortgages of this kind. I took mortgages on real estate too. Yes, I knew that in order to protect the bank against subsequent bona fide purchasers that my mortgage would have to be recorded to protect me. I mean a purchaser of the merchandise, but I didn't think we needed any protection against that. I was acquainted with that principle of law, but I knew Mr. Virgin would not sell the stock we had a mortgage against without consulting us.
18 As to the recording of Chattel mortgages with the Commercial National Bank, and as to our custom, we have handled a great many chattel mortgages that we didn't record and some we did record; I should say we recorded fewer than we held unrecorded. There are varying circumstances with each mortgage as to why we record some and keep others off the record. In a good many cases Mr. Cobb used to take what I reckon you would term bills of sale to merchandise as security to indebtedness. Where we had confidence in the integrity of the party that was keeping it, and in other cases that would come up where we felt towards them like we did in this case, there was no necessity of recording it. I think Mr. Virgin's debt outside of this seventy-five hundred dollars, or the three thousand dollars on February 16th, was about eight thousand dollars; I am sure that it is approximately the amount.

Yes, that was in addition to the seventy-five hundred dollars; I think he owed us about eight thousand, and this was an additional

loan. Mr. Virgin, I think, had a line of seventy-five hundred with us, which we thought was a perfectly proper extension of credit to him, and I do not know how it got increased above that amount. It was not much above it, probably somewhat, and then when he, in discussing Mr. Virgin's affairs during the year—I would say I don't remember the exact time prior to that—he had been telling me that he was going to reduce his stock and I think he intended to do it and reduce his liabilities proportionaely but had never been successful, and really when this mortgage came up I had a twofold reason for taking the mortgage; in addition to the security it gave us, it put it where I could properly insist a little more effectually on Mr. Virgin reducing his stock, not that he would not have met my views in any matter he could have, at the same time with the powers given the Bank in this mortgage, I think we could have properly in the event that he didn't want to reduce his stock and wanted to continue on the line he had been going, we could have forced him to do so without the delay we otherwise would have had. The eight thousand dollars that he owed besides the
19 bank's indebtedness, did not include the debt of five thousand dollars to the Central Trust Company. I can not say, I do not know, how much he owed outside of what he owed the Commercial National Bank at the time I let him have this money—this three thousand dollars; it was an amount that this credit of seventy-five hundred dollars and a reasonable amount of business would probably care for—that this seventy-five hundred dollars and a reasonable amount of sales would liquidate. Before this mortgage was executed, I think his line was really seventy-five hundred dollars; that is what we expected him to use, but I think he had used a little more than that. He had exceeded that line a little. Then he came to me and borrowed three thousand dollars and gave a mortgage for seventy-five hundred dollars, including future advances. At that time I knew he owed five thousand dollars to the Central Trust Company. That open account indebtedness—that eight thousand dollars he owed me was not decreased after that time, nor was it decreased during the time after this mortgage was executed. I knew at that time that he bought the business of Mr. L. O. Stevens. I knew he owed some money, but my information from Mr. Virgin was that it was very much less than it had been; in fact, he had been making payments to them all along during a period of years. My recollection is that it was something like a thousand dollars. The actual figures may have been a little more or a little less. I don't recall, but I know Mr. Virgin had referred to them as probably being his largest creditor outside of the bank, and he had from time to time had frequent conversations with Mr. Stevens about that and I presume about his general condition, and I think that account was running along satisfactorily to Mr. Stevens. At the time Mr. Virgin borrowed the three thousand dollars he had exceeded his seventy-five hundred dollar line of credit. I knew at that time that he owed the Central Trust Company five thousand dollars, and I knew he owed the Stevens account, which was approximately a thousand dollars. And I knew he also owed other

creditors as well. I didn't give any consideration particularly
20 to the recording of the mortgage. I never did figure out its effect. It it had been the means of withholding him from buying more goods, as you rather intimated he has bought since that time, I think I should have put it on record. I didn't want him to buy anything else. As to the recording of the mortgage lessening his chances of buying more goods, I didn't figure on that part of it because I didn't want him to buy any more goods. In this particular case, I don't know just how the mercantile agencies would have handled the recording of the mortgage, but Mr. Virgin had all the credit he needed any may be more. It depends on how much credit you are talking about as to whether the recording of that mortgage would have decreased his ability and his power to get credit. It probably would have decreased his power to get any large sums of credit, but I don't think it would have kept him from getting what he needed. I would like to state that I never had figured on Mr. Virgin's general credit because I tried to make it plain that so far as we were concerned we were not seeking any credit for Mr. Virgin, as you will undoubtedly recall. Our interest in Mr. Virgin, my own interest was in addition to that as being a banker, was from a standpoint of interest in his success, was for him to quit using credit and our repeated conversations we had with him from time to time that was generally the subject of the conversations between us—to eliminate some of his credit—quit using it. The Commercial National Bank was not seeking to boost his credit. I don't know just how to answer the question about general credit, because I had not figured on it. I presume general credit is a man's ability to go anywhere in ordinary mercantile circles and use his own name as a basis of cash advances to a reasonable extent, and I never had figured on that phase of it because I did not think he wanted any general credit. We were not desirous of his obtaining general credit. I don't know whether he continued to do a credit business after this mortgage was executed or not. It was our request to him and sort of understanding between us. It was our idea he was not to incur any more credit. I
21 imagine the record would show more about that than I could testify to. We didn't want him to acquire any more credit because we felt that Mr. Virgin could work out his obligations by doing a smaller line of business and maintaining a smaller stock of merchandise. His capital we didn't think was sufficient to carry the amount of investment he had and forced him to use credit. We wanted him to reduce his investment and reduce his liabilities. I knew at that moment that this money he got from me was not sufficient to pay all his creditors; he didn't borrow the whole seventy-five hundred at that time you will recollect. I won't say that when he got the three thousand dollars that that was not a sufficient amount—and when I got the mortgage, that the money he acually got was nothing like a sufficient amount to pay all his creditors, because without remembering the exact figures, I stated I thought this seventy-five hundred dollars in addition to an ordinary amount of sales for him would enable him to clean up every-

thing—outstanding obligations except the Commercial National Bank and the Central Trust Company. At the time he got the three thousand dollars he owed the bank something over eight thousand dollars, he owed Stevens a thousand and something over; and he owed the Central Trust Company five thousand and he owed other creditors whose amounts I don't recollect. I knew that the three thousand dollars that he got when he gave me the mortgage was not enough to pay all his existing debts. I was satisfied that out of the sales from his business that he would be able to realize enough with the additional forty-five hundred dollars that he was to get on the mortgage to pay up what he owed. No, sir, I don't think that if I had put this mortgage on record that my hopes in that respect, or his efforts in that respect, would have been interfered with by the recording of this mortgage; because, if we were going to lend him the seventy-five hundred dollars, and what ever amount we figured would be necessary for him to raise from his sales, certainly those two things would not be affected by the recording of the mortgage. No, I would not say that his ability to work
22 out his business and to pay up his creditors with the additional forty-five hundred dollars had anything to do with my keeping the mortgage off the record or recording it.

Examined by Mr. Plunkett:

Our custom with reference to recording mortgages on real estate was about the same as it was on Chattel mortgages, we didn't alway-record mortgages on real estate. If don't know what percentage of our mortgages on real estate that we did not record. We didn't take a great many mortgages on real estate. I would not know just how to answer you as to that. Yes, I can recall a mortgage that we did not record, but I think the Commercial National Bank took very few mortgages on real estate. Probably the biggest one it ever took, I have got in mind right now and this mortgage was never recorded and the other was for some reason nor recorded,—I don't remember just why,—probably for the same reason I gave you in this case—there was no necessity of it until just a short time ago—a comparatively short time ago. No, as a rule, the mortgages that I took on real estate that were not recorded were not given to secure past due indebtedness. We never did voluntarily make a loan on real estate because you have got to—in making loans on real estate you have got to have a reason for so doing it; otherwise, you should not do it. In some cases we have made loans on real estate because it was very much to our customers' interest to obtain the money on real estate, and at that time that was the only form of security he could put up. In some cases we have taken loans on real estate and put up a much larger amount in order to make secure a smaller amount.

Examined by Mr. Jones:

I know we didn't give Mr. Virgin any promise not to record the mortgage. I don't recall that he asked me anything about recording

it. I know that we had no agreement, express or implied, and
23 no understanding that the mortgage was not to be recorded. My honest belief was that Mr. Virgin was solvent at that time. I knew that he had some interest in outside property—real estate at that time. And I knew that he had a large stock of jewelry and conducted one of the most prominent jewelry stores in Macon. He owed my bank at that time a little over eight thousand dollars before I made him this loan of three thousand dollars. I did not think it necessary at that time to get any security for that eight thousand dollars; didn't attempt to get any. I did not make any effort to get any. I did not believe the bank needed any security for the eight thousand dollars; I am sure Mr. Virgin would have given it to me if I had insisted on it or even asked him for it. There was no reason why I could not have recorded that mortgage any day I wanted to. There was no reason of any kind for withholding the mortgage from record. The Commercial National Bank did not keep that mortgage from record for the purpose of bolstering up the credit of Mr. Virgin. The Commercial National Bank didn't wan't Mr. Virgin to use any more credit. I did not desire to bolster up his credit. I did not think at the time that the keeping the mortgage off record would bolster up his credit. So far as I knew, the bank nor any of its officers knew that Mr. Virgin was insolvent at the time. Yes, I think it was the exception rather than the rule with our bank to record mortgages except for the purpose of foreclosing it or something of that kind. It was not our custom to take mortgages from insolvent people at all; that is, where we knew or believed they were insolvent. Yes, every dollar of the consideration for this mortgage money was actually loaned—this seventy five hundred dollars. I actually loaned him seventy five hundred dollars in money. And that seventy five hundred dollars went to his creditors other than the bank so far as I know.

Examined by Mr. Feagin:

I knew of the loan from the Central Trust Company for
24 five thousand dollars. I assisted in the negotiations of that loan. I knew that to secure that loan he had transferred to the Central Trust Company his open accounts that were due him, and that that transfer was renewed two or three different times to cover subsequent accounts; probably more often than that. I think Mr. Virgin paid the five thousand dollars that he got from the Central Trust Company to the Macon Savings Bank; that is my recollection. He did not pay any part of it to the Commercial National Bank. Yes, it is true that his open accounts were transferred from time to time; as to whether it was all, I am not competent to answer that. No, I can't say that I was informed that Mr. Virgin had transferred his accounts, practically all of them, to the Central Trust Company; only enough of them to make what we believed security for that debt—around that. I do not know what proportion of his accounts was covered by that transfer. It probably covered practically all of them that were collectable. Yes, I knew that under this assignment to the Central Trust Company that money collected from

his accounts was to be paid to the Central Trust Company, unless he could agree with the Central Trust Company as to other collateral. No, I didn't know that the expenses of running his business and paying the current bills would amount to practically the amount of new sales that he might make; he was in a mighty sorry line of business if his gross sales would be consumed in paying his expenses. He kept me informed as to the amount of business he was doing.

Examined by Referee:

I am sure Mr. Virgin kept me informed of the amount of business he was doing, but I don't recollect the figures. I made this loan of three thousand dollars in February. And I found it necessary to advance to him the other forty five hundred dollars. I don't remember any particular conversation with him. He secured this loan all along. There was three thousand dollars in March, and five hundred in April, five hundred May 4th, five hundred dollars May 19th. It is evident he came in and wanted some more money under that mortgage and we let him have it. I can't recall that he expressed himself either way as to whether his condition was growing worse or better. I don't remember his telling me anything about his condition in February. As to his reason for wanting to get the balance of the money—the three thousand dollars there in May, it was rather understood between us that if he had to have the balance of this seventy five hundred dollars that we were going to let him have it, and having entered into this arrangement, I don't know that we discouraged him at all from calling for seventy five hundred dollars, because we had an understanding that if he needed it, we would put it up. While we hoped we would not have to put it all up, yet it was not any surprise to us when he called for it, and I don't recollect any further conversation. I am sure that nothing was said in that conversation on May 19th about the recording of the mortgage.

Examined by Mr. Geo. S. Jones:

No, I had not heard anything up to the time I let him have the last amount on the mortgage to induce me to believe or suspect that his condition was worse than when the mortgage was taken. I never at any time believed him to be insolvent; I don't think that at any time he ever thought he was insolvent. My answers applied to the giving of each of those notes, as well as the questions you asked me with reference to the giving of the mortgage—the agreement, understanding, my belief, etc. And at the time when the notes were given I had the same belief and the same understanding and notice that I had when the mortgage was given on February 16th. As to whether the Central Trust Company took a paper in the nature of a transfer of the accounts, that they never got possession of the accounts, never took a trust receipt, never made Virgin account for his collections, and that it was simply a formal matter so far as I know, you are do-

ing like those other gentlemen did; you are asking me a good
26 many questions in one. I guess you would call it a formal matter. Mr. Virgin always executed to them a transfer of accounts which I presume was a sale of those accounts to them. It was intended to be such. I do know along that line that the Central Trust Company consented to his collection of those accounts. They consented to me for him to do it, that is correct. The Central Trust Company never actually undertook to collect any of those accounts; they allowed him to collect them. And they also allowed from time to time a substitution of other accounts for those he had collected. As to the trust receipt; an account is nothing tangible, so far as I know he didn't execute to the Central Trust Company anything except his bill of sale to the accounts. I don't suppose that it would be necessary to give any trust receipt because the accounts were theirs and whatever he had to do with them was purely by their consent. There was always an itemized list of what he sold the Central Trust Company. He never transferred any statement or transferred any books, unless you would call a statement, the names and accounts—a statement of the accounts. All he did was to make up a list of accounts and then on that list a transfer of those accounts as security for the debt. And as he would collect those accounts from time to time he would give them a transfer of another list of accounts. So far as I know he never paid over to the Central Trust Company any of the money collected on those accounts; he had their consent not to do that. It was understood that they had a right to call it off. It was their accounts; they could stop him from collecting any time they wanted to, but as long as it was satisfactory to them they would let him substitute new accounts.

Examined by Referee:

After May 19th, after he had gotten the last money from me, I did not have any conversation with him in which he told me that he was buying large quantities of goods and putting them in the store—buying them on credit.

27 J. H. VIRGIN, recalled, testified:

Examined by Mr. Feagin:

I don't remember what amount of stock I had in my store at the time this mortgage was given—but around—something over thirty thousand dollars. I don't remember either what amount of stock I had at the time I got the additional money in May from the bank; there was much change in it. It inventoried something over thirty thousand dollars. I don't remember what the exact amount was. I don't remember the amount of the notes and accounts. I was somewhere around six or seven thousand dollars. I think that was approximately the same amount I had when the petitions were filed. I did not have any conversation with any of the other officers of the bank than Mr. Lewis regarding my affairs. I did not discuss with Mr. Lewis the mortgage at all at the time I got the additional money from him in May. I did not tell him why I needed the additional

money. I don't remember what conversation occur-ed between us at the time I went back to get the other money. There was no mention of the recording of the mortgage at *m*-y time except that first time; there was no promise made me at any time regarding it. I don't remember now what real estate I had at the time the loan was made. I had a life interest in two hundred and forty acres of land. It was not put in at any value at all. It is not worth anything to me or anybody else that I know of. Mr. Lewis was acquainted with my interest in that real estate; there was not anything said about it at the time, but I think he knew about it all along, what it was.

Examined by Mr. Geo. S. Jones:

There was scarcely anything at all bought on a credit after the giving of the mortgage; I think possibly two hundred dollars would cover it—what it was absolutely necessary to have. After the giving of the mortgage in February there was practically nothing bought at all.

28 Examined by Mr. R. D. Feagin:

I think thirty four thousand dollars is the biggest amount of business we have ever done in one year. I don't know what I did from the time of the giving of the mortgage up to the time the petition was filed. I had reduced my indebtedness. I don't remember now the exact amount it had been reduced. I have no idea how much it had been reduced.

Examined by Referee:

No, I did not buy many goods on credit after May, during June and July. There was very little bought during 1914 at all after the first of January, even December of 1913. I had no reason to make any purchases at all. Our idea was to reduce that stock. We shut down buying altogether.

Examined by Mr. Jones:

The two hundred dollars I bought after the mortgage was given I think is all I bought on a credit up to the time of the bankruptcy.

J. J. COBB, sworn, testified:

Examined by Mr. R. D. Feagin:

I occupied the position of Vice President with the Commercial National Bank. I knew of the giving of the mortgage by Mr. Virgin to the Commercial National Bank. Mr. Virgin did not discuss his affairs with me. I knew Mr. Virgin was indebted to the bank. I knew that it was his indebtedness, and I knew that Mr. Lewis felt confident that Mr. Virgin was all right—could work out. The mortgage I suppose was filed away by Mr. Lewis among other papers of that kind. The custom at that time and prior to that time as to recording them was, sometimes they were recorded and some-
29 times they were not. When they were not recorded I suppose it was because we felt that there was no necessity for it.

I don't think there has been a single instance where they were kept off the record because of an agreement with the maker of the mortgage. There might have been some instances where they were kept off the record to help the maker of the mortgage in his business, to keep from injuring his credit; I was trying to recall if there was any instances of that kind. I don't right now recall any. I don't know that it would have hurt Mr. Virgin's credit if the mortgage had been put on the record at the time it was taken. I don't think in his case it ever came before me in that way at all. Mr. Lewis was always confident of Mr. Virgin's solvency, that he was all right and could work out. He so expressed himself. That he had overstocked, I think, and had done too much credit business, but that he was going to reduce his stock, etc. and pay up. I was not posted as to whether he had a good many other creditors and that if the mortgage was put on record they might close down on him. Yes, it was likely to occur; it would affect his credit. I never did discuss with Mr. Lewis whether or not he should put this mortgage on record. I can not remember any conversation about this question at the bank. I was not informed that the mortgage had been recorded or anything about the mortgage.

J. H. VIRGIN, recalled, testified:

Examined by Mr. Plunkett:

The bill of Robert H. Ingersoll & Bro., dated May 7, 1914, for $5.68 was for exchange and repairs on Ingersoll watches. That bill was made after I gave the mortgage. The bill for Carter Howe & Company, dated July 3, 1914, for $19.00 was made after the mortgage was given. The one for Keller Jewelry Manufacturing Company, dated July 22, July 22 and August 15th, the date on this bill is an error that was made in 1913; the one for Frank W. Smith Company, item of April 24th, $65.00, this was bought prior to that time, it was shipped out at that time. The goods came in at that time. The goods on bill of April 24th were shipped to me in 1914. The statement from C. A. Vanderbilt, that was bought in 1913. As to the bill of July 24th, 1914, for $7.00, that was all bought prior to that time. That July 24th item is wrong, it was bought in 1913. I think if you will refer to the books you will find that it was right. It was bought in 1913 also. The bill of the A. Dubosg Gresimer Company, dated August 4th, 1914, was bought in 1913 with a July dating on that. I got it in 1913, it came in for our Christmas business. The bill in favor of Thomas Company, dated September 24, 1914, was bought in 1913. It was shipped in 1913; all those things were bought for the December business. The claim in favor of the Macon News Printing Co., 1914, items amounting to approximately $90.00, may be correct, I don't remember about all those different items. It was for advertising. The bill for Moore & Cheatham, running from April to August, amounting to $71.25, should be charged to a negro on my place but I suppose they held me responsible for it. I suppose it was bought in 1914, I think it was. The bill from the Basset

Jewelry Company for only twenty-eight cents was bought in 1913. The item of $31.71 in 1914 was bought in October 1913. The bill for William B. Durgin Company, $20.75, dated February 17th and 27th, 1914, I don't owe at all. They tried to make me pay for collections they put through the National Jewelers Board of Trade. They tried to make me pay the charges they paid for making collections, I refused to pay it. The bill from Jonah Koch, dated April 17, 1914, for $4.00 may be right. I think it is right, yes, sir, it is right. The bill of $45.00 in favor of the Whiting Manufacturing Company, dated April 17, 1914, is correct. And the other bill of $107.50 for the same people is correct. The bill of $92.70 in favor of the Mt. Vernon Co., I would have to refer to my invoice book on those things to be exactly right, because I don't remember
31 those items. I can't say positively about its being correct, but you will find the original invoices in my invoice book, which Mr. Martin has. The bill in favor of Dungan Jenner for $80.89, dated September, 1914, that is about $64.00 of it is correct. The bill for Ignomar, Goldsmith & Company for $176.00, dated August and September, 1914, was bought prior to that time, I gave them notes—they went to protest—that is what they charged back to me on that thing. I bought those goods some eight or ten months —twelve months—before that time. Those diamond accounts run from eight to twelve months. The bill from G. Bernd & Co. for $4.20 is correct; that *that* was in March. The bill of E. J. Swigart & Company for $466.14, running from June 5th, 1914, to August 21st, 1914, the right amount for that year would be $37.08 for 1914. The rest was prior to that time. They also have notes for that. Yes, the difference between $37.08 and $466.14 is represented by notes; the only amount bought in 1914 is this item of $37.08. The account in favor of Simons Bros. Co., $19.77, bought in July 1914, if I can look at the invoice I will tell you about that. That was bought in 1913. The original invoice I am talking about, the one we have got in the invoice book. The bill of the William Link Company was bought prior to that time. The invoice for $215.69 for two notes, together with some merchandise on September 17th, that was bought prior to 1914. It was delivered to me prior to that time, these notes will show that. Here are the notes attached. There is an additional credit on that. The merchandise item of September 17th of $45.00 that was in 1913. The bill of the Novelty Bead Company for $87.07, the item of April 28, 1914, to beads $27.03, all this was bought in 1913; there was not anything bought from them in 1914 at all. The bill of Rogers, Lunt & Bowlen Company for $102.05, dated August 26, 1914, that was bought in 1913; if you will look up the invoice on that you will find that to be the fact. The bill from Bippart Griscom & Osborn, dated September, 1914, for $229.21, was bought in 1913, prior to that time. The
32 item of $75.00 in February on the 9th of February, 1914, I don't know about; it is a credit anyhow. There was nothing bought during 1914 at all.

Examined by Mr. Geo. S. Jones:

On the Bippart, Griscom & Osborn bill, all those items of merchandise were bought and shipped in 1913 and before 1914. And the Rogers, Lunt & Bowlen Company bill, which shows merchandise September 16th and 27th, was bought in 1913. On Ingomar, Goldsmith & Co., there was not anything but notes charged up. *Those*

Examined by Mr. Geo. S. Jones:

On the Bippart, Griscom & Osborn bill, all those items of merchandise were bought and shipped in 1913 and before 1914. And the Rogers, Lunt & Bowlen Company bill, which shows merchandise September 16th and 27th, was bought in 1913. On Ingomar, Goldsmith & Co., there was not anything but notes charged up. Those goods were purchased in 1913—some of them in 1912. As to Dungan, Jenner, the whole debt $80.89 subsequent to January 24, 1914, one page showing $11.91, another page showing $23.50, another page $17.91, and another one $23.61, another one $17.35, and another one $9.00, and as to whether they represent purchases and shipments made during the year 1914 and after January 24th, there was stuff bought from them all along. That is an engraving account. We sent them orders possibly every day or two—every week. I don't remember Mr. Jones what proportion of those amounts were shipped after January 1914. I could not tell unless I checked this up with my invoices I have in my book. You say the balance due them is $80.89. I don't remember whether we paid them $125.00 during that same time or not, I sent them several checks. We were practically paying them cash for the cards they shipped me engraved, we were supposed to pay it up monthly. They were
33 engravers that filled orders for engravings that I sent them along and I paid them as I sent the orders. The bill of William B. Durgin & Co., which shows shipments made on February 17th and 27th, that is not for any goods at all. That was a collection charge they tried to make me pay. I refused to pay it. I didn't owe it. We had a good deal of correspondence about that. So far as I know the bill of 28c. from the Bassett Jewlery Company is all I bought from them after the date of the mortgage. The Moore & Cheatham bill was not for goods sent to my store at all. It is for stuff sent out to a tenant on my farm. The Macon News Printing Company bill is not for goods bought from them but for advertisements I ran in their paper. And what there is, only a very small portion of that occurred since the giving of the mortgage. I considered it paid on account of the credits due me by some of the men down there at the office. It had been running for some time. The bill for the Thomae Company represents a note due them, that is all. And the goods were bought prior to the giving of the mortgage. The Dungan Jenner Company does not show the date when the goods were shipped. According to my best recollection they were shipped prior to the 1st of January 1914. The bill of the Carter Howe Company dated July 3rd, 1914 (?) I think that is when they shipped the broach to me. I do not know when it was

shipped to me on memorandum. It was a month or two prior to that date there. July 3rd represents the date the goods were shipped to me. July 3rd is the date when the goods were charged to us.

Examined by Mr. R. D. Feagin:

I told a half a dozen of my creditors about the giving of the mortgage. I told Hayden W. Wheeler & Company and William Link Company. There were several others. Mr. Fessendem of the Hayden W. Wheeler Company, was here the same week we were figuring on the mortgage, about getting the money. I had a long conversation with him about it. He was connected with the
34 Jewelers Board of Trade in some capacity—I don't know what. Those two are the only ones I remember now, but I have spoken to a good many others. We were friendly. Hardeman, Park, Jones & Johnson were the attorneys representing the petitioning creditors that filed this petition against me. I don't know whether they represented the Commercial National Bank or not. I don't know whether the petitioners who filed the petition were acquainted with the condition of the Commercial National Bank or not. I think at that time the Commercial National Bank had liquidated and the American National Bank had taken charge of all its assets. I had gone over my affairs with Mr. R. J. Taylor, the President of the American National Bank before the petition was filed. Mr. Taylor had not told me anything in regard to my continuing in business. He knew my condition from the statement I gave him. I did not ask him for any further credit. The Commercial National Bank was not in a position to credit me any further. It was impossible for me to go on in my condition at that time without their consent.

Examined by Mr. Geo. S. Jones:

I got Mr. Taylor up a statement as to my condition. I don't remember what conversation I had with him at the time I gave him the statement. I made an effort, of course, to stay in business. I don't remember now what the salient features of the conversation were.

Examined by Mr. R. D. Feagin:

I do not know who filed the mortgage for record—who recorded it. I do not know who had charge of the mortgage at the time of the conversation with Mr. Taylor. I suppose Taylor had it. I discussed the mortgage with him in that conversation. He told me he was going to have it recorded. I don't know how soon after the conversation it was recorded. I think the American National Bank as liquidating agent at that time had charge of all these accounts of the Commercial National Bank. I don't remember exactly
35 in that conversation whether Mr. Taylor told me it looked like from my condition that I was insolvent and could not go ahead in business. I think he said something to that effect. I don't remember how soon after that, nor what the date was that the mortgage was recorded and the petition filed.

Examined by Mr. Geo. S. Jones:

The name of the man connected with the National Jewelers Board of Trade was Mr. R. G. Fessendem. I do not think he was president of that company; he was connected in some capacity, I don't think he was president. He was an officer at the time I talked to him. The National Jewelers Board of Trade is an association of practically all of the jewelers in New York. The retail merchants make reports to the National Jewelers Board of Trade to be given to their members; they are requested to do so and a great many of them do it. I told Mr. Fessendem about this mortgage. It was the same week the mortgage was given, I think. I don't remember the date. He was here in Macon. I did not decline to tell anybody about the mortgage. I do not recall anybody who made inquiry of me about my condition—any merchant or creditor—whom I failed to tell about the mortgage. I was not keeping it a secret. When I was talking to Mr. Taylor, shortly prior to the filing of this mortgage, there was nothing said about my solvency or insolvency. I got up the statements hurriedly from my books and showed him. I thought I was solvent at that time. I told him what I thought about it. I never told him I was insolvent. I never told him so at any time.

Examined by Mr. R. D. Feagin:

I was not required to make a report in writing to the National Jewelers Board of Trade any more than I was required to make to Dun & Bradstreet. We have got an option as to that. I
36 did not make it to them in writing. I have not made any report to them in several years. This man who came to see me was a member of the wholesale concern in New York. I owed him—his firm—personally for jewelry. Well, I had talked about my condition with him before. He came down here and stopped over to see me and went over the accounts again. My conversation with him was about personal affairs, about the account I owed him, and not with him in any sense as the President of the Jewelers Association with any idea of his making a report on it to the other jewelers throughout the country. I do not recall when I had that conversation with Mr. Taylor. I don't know how long it was before the bankruptcy, it was several days before, I don't remember exactly.

Examined by Referee:

I knew a day or two before the petition was actually filed that one was likely to be filed by Mr. Taylor—the Commercial National Bank. I knew the day it was to be filed, I didn't know before that. I didn't know it the day before that. They had talked it over. They discussed filing it with me. The discussion was with Mr. Taylor. I don't remember exactly what the conversation was. There was nothing said at all about recording the mortgage. Just told me it had been recorded on that date, or would be recorded on that date; I don't remember what that was. It was a day or two after that that he said

he was thinking about filing the petition in bankruptcy against me. I don't remember the exact date I had a conversation with Mr. Taylor. I had a conversation with him before the mortgage had been put on record. Then he told me he was going to have it recorded. He also told me that he thought bankruptcy proceedings would be filed. Yes, sir, I learned that day it was to be filed.

Examined by Mr. Geo. S. Jones:

I don't remember how many talks I had with Mr. Taylor; two or three. I had one talk that I recollect before the mortgage
37 was filed. At that time I was trying to get him to wait on me and not press the mortgage, and let me go on in business. I didn't decide in that conversation what he was going to do, whether he was going to help me—let me go on or not. He did not say anything about bankruptcy until the day the petition was filed. I don't remember exactly Mr. Jones, the first time I heard anything from him I think was that day. I don't recollect him saying anything about bankruptcy until the day the petition was filed.

Examined by Mr. R. D. Feagin:

I talked this matter over with Mr. Jones, Bruce Jones, I believe, representing the bank, a member of the firm of Hardeman, Jones Park & Johnson. I don't remember right now what conversation I had with him. He was representing me up to that time. He had been representing me in the capacity of an attorney. I don't remember at the time I had this conversation with him whether the mortgage was discussed or not. I don't remember either whether he discussed the probability of their putting me in bankruptcy. I had talked over my affairs with Mr. Jones a good many times. I don't remember when the last conversation was I had with Mr. Jones about my affairs. It was before my first conversation with Mr. Taylor. I don't remember how long before. I was not consulted at all about the petition that was filed against me. I don't remember who it was I got the notice from that it would be filed. I don't know where the mortgage was at the time I was figuring with Mr. Bruce Jones and Mr. Taylor. Mr. Taylor did not tell me he had it in his custody and control. Mr. Taylor told me that the American National Bank had taken over all the business of the Commercial National Bank.

38 Mr. R. J. Taylor, duly sworn, testified:

Examined by Mr. R. D. Feagin:

I never saw the paper, I don't think in my life made by Mr. J. H. Virgin to the Commercial National Bank. We had the paper as I understand but I never saw it. It was among their papers after the American National Bank took charge of the affairs of the Commercial National Bank. And the transfer was made about the 1st or 3d day of August last year. I suppose you would say the 1st, I think it was the night of first maybe. Yes, I recall having a conversation with

Mr. Virgin about his affairs before the petition for bankruptcy was filed against him. Mr. Virgin came down to see me in regard to his indebtedness, I don't remember how long before the bankruptcy proceedings, but I think a few days before. No, he didn't show me a statement but I asked for one and he gave me a verbal statement. After he made me a statement of his affairs, I told him we could not give him any assistance—The American National Bank. I don't remember telling him he was insolvent, but I remember telling him I didn't think he was in a condition that we could loan him any money. I don't rememebr whether I mentioned to him the fact that the American National Bank held this mortgage; I don't recall that. The mortgage was in the bank somewhere among the papers. We kept them separate as we do now from the American National Bank papers. I don't remember when it was turned over to Hardeman, Jones, Park & Johnston. I don't remember who brought it over to have it recorded; we had quite a number of mortgages, Mr. Feagin. We usually record our mortgages. As soon as we learned that there were several mortgages among the papers we had taken over from the Commercial National Bank we decided to have them all put on record. I don't remember the date. I don't remember who they were turned over to or anything of that kind. I can't recall whether we had any other mortgages recorded on the same day this mortgage was recorded. I could not answer that question. I can't say
39 that I can recall at whose direction that mortgage was put on record, except in a general way. I asked that all of them be put on record. At the time of my conversation with him he didn't make the statement to *the* that he was insolvent. I don't know what you would call insolvent. I have seen people that had an indebtedness of fifty thousand dollars probably have one hundred thousand of assets. Basing my answer on the bankruptcy definition of insolvency of being unable to pay debts in full—where the assets at a fair valuation are insufficient to pay debts in full, I will answer it this way. I could not have considered it a safe loan for the American National Bank to make. My recollection is, Mr. Virgin came down to see me about what arrangements he could make with the indebtedness he had with the Commercial National Bank,—I am not sure about that, and probably we discussed what the American National Bank could do for him. I don't remember talking to Mr. W. E. Martin, Jr., on the E. B. Harris corner after Mr. Virgin was in bankruptcy, in which I stated to him that I had told Mr. Virgin when he came to me that from the statement he made me, that he was hopelessly insolvent. I don't recall making it on the street out there near the bank. I don't remember, Mr. Feagin, I might have made a statement, but I don't recall it, I really don't recall having any conversation at all with Mr. Martin, or about Mr. Virgin's condition. I would have to have something to remind me of it maybe. I don't recall.

Mr. W. E. MARTIN, JR., duly sworn, testified:

Examined by Mr. R. D. Feagin:

I have examined the filing of the docket for personalty mortgages in the clerk's office of Bibb Superior Court to ascertain if this mortgage is filed for record. It is not filed for record on that docket. It appears on the filing docket of real estate transfers, it does not appear on the mortgage index of real estate, or on the deed index of real estate. You see, there is a filing docket of personalty and there is a filing docket of realty or mortgages on realty and deeds too. It appears on the filing docket for the entry of mortgages on real estate and deeds to real estate. It does not appear on the personalty filing docket, nor is it transferred from the filing docket for real estate transactions to the idex for real estate transactions. You understand, after they are entered on these filing dockets for real estate transations, then there is a general index for mortgages and deeds to secure debt and warranty deeds. I was not able to locate it at all the first time I went there to look for it. It was actually recorded in the clerk's office in one of the regular books in the Clerk's office of Bibb Superior Court. There is an index in this county for deeds to secure debt and mortgages on real estate. I recall having a conversation with Mr. R. J. Taylor just after Mr. Virgin went into bankruptcy, or after this petition was filed. I guess Mr. Taylor has so many conversations, it is hard for him to recall it, but I recall this. It was the first time he spoke to me about having some one go through this stock and investigate it for him. I met him, I think it was close to the corner there of E. B. Harris & Company. It was pretty windy there and we walked right over there in front of the bank. We were speaking of the Virgin case as to what time it would be convenient for some one representing him to see this stock. I told him any time. I had just about completed my inventory. My recollection is that he stated he told Mr. Virgin, from his own statement, that he could not go on. He did not see how in the world he could go on. That is my recollection of what he stated. On Mr. Virgin's own statement to him, he didn't see how in the world he could go on in business. That must have been ten days or two weeks after the petition was filed. I had just about completed my inventory and was ready to have any one go in there and check it over. From my conversation with Mr. Taylor with reference to his conversation with Mr. Virgin, he didn't state when it took place. He stated he told Mr. Virgin from Mr. Virgin's own statement to him he didn't see how he could go on in business. I don't remember any such word was used as insolvency. What I have stated is as near as I can come to what was said by Mr. Taylor. I didn't have any idea I would be called on to remember it. I have tried to think of it and have stated his expressions as near as I can recollect them.

Examined by Mr. O. A. Park:

This mortgage was actually recorded in Bibb Superior Court.

And properly recorded so far as the record of it is concerned. The only thing that is the trouble with it is that it is not indexed on the proper book. It was indexed but not indexed on the proper book. It is recorded where papers of this kind are recorded, that is my recollection. I can't answer positively as to its being recorded along with other chattel mortgages in a book for the record of chattel mortgages in the Clerk's office of Bibb Superior Court, because it has been about ten days since I examined the record, but it was recorded in one of the regular books of the clerk's office; whether that book was devoted exclusively to chattel mortgages or not, I am not in a position to testify. It is one of their regular record books.

J. H. VIRGIN, recalled, testified:

Examined by Mr. R. D. Feagin:

That mortgage is in the handwriting of Mr. Lewis. It was drawn in his office in the Commercial National Bank Building. I don't remember now what happened at the time the paper was signed. That paper was signed by me at Mr. Lewis' desk. I don't remember where Mr. Deborde was at the time I signed it. He was receiving Teller in the Bank. The Receiving Teller's place is about ten feet I should say from Mr. Lewis' desk. It was the nearest cage to Lewis' desk. Lewis' desk is in the back part of the banking room, I imagine ten feet from the cage. I can't remember whether Deborde was with us at the time or whether he witnesses
42 this afterwards. My best recollection is, I don't think he was with us. The three of us were not together right at that time. I delivered it to Lewis after I signed it. I don't know what Lewis did with it. I don't know when Deborde put his name on there. I did not see him put his name on there. I can not say whether he saw me sign my name to that paper or not. He was not with us—standing right there by us. I can not say whether he saw me sign my name or not because he could have seen it from his cage. This was during banking hours. He was on duty during banking hours that day. There had been nothing said before me at that time to Mr. Deborde as to what kind of paper that was. I don't remember that I ever acknowledged that paper before Mr. Deborde. My recollection is that I signed it and left it with Mr. Lewis. Mr. Deborde was familiar with my signature being in the bank, and being a customer of the bank.

Examined by Mr. Harris:

The rent that is due Alfred Willingham was the last month we were in the building, that was for July, I think it was, July and August I think. The claim was only for one month.

J. M. DEBORDE, duly sworn, testified:

On February 16th, 1914, I occupied the position of Receiving Teller with the Commercial National Bank. I was at that time also a Notary Public of Bibb County, Georgia. The bank had me

appointed. They paid the necessary fee for having me appointed. I was there and attested all necessary papers and witnessed them in the bank. I did not make any charges for doing so. I was not a stockholder in the bank, nor related to any stockholder. The duties of the Receiving Teller was to take in money, checks, anything deposited to people's credit across the counter. I don't know whether I was elected to my position by the stockholders or
43 not. The officers of the bank were the ones who employed me. That is my signature on the paper. I have no recollection, no independent recollection of the signing of my name on that paper only in this way; I was just around there and witnessed papers, not only that one, but other ones not only for him but different customers of the bank every day. This was the usual manner in which I witnessed papers for the bank: Mr. Lewis or Mr. Cobb they fixed up most of the papers, they would fix them up and either get me to come around there to the desk or they would bring whoever it was to my window or to the back of the cage there, and say Mr. so and so has signed this, witness it. The man would generally be there; I would say, did you sign it; he would say, I did; then I would hand it back to him. I don't remember about this one; I suppose it was the same way. It is my best recollection at this time, that it was signed and brought to me and acknowledged by Mr. Virgin. I have no recollection about it; that is the way we did most all of them because I had something else to do, they never did ask me to go back there—very seldom. No, I could not say that I actually saw Mr. Virgin sign that paper. I don't remember anything about it except I remember seeing Holt in there a great many times. I do not remember this particular paper. My best recollection is according to the way I witnessed most of the papers there, that he had signed it and acknowledged it before me. Most of the time when any one was at my window my duties kept me with my back to Mr. Lewis' desk, but you see when any body was not at the window there was a little desk where I could straighten out the money, that way I could look either way and see Nat's desk. By Nat I mean Nat Lewis the Cashier.

Examined by Mr. O. A. Park.

Yes, I could see anybody signing a paper at Lewis' desk, but not while I was waiting on the window, because my back would be to his desk. I didn't sign any paper officially as notary
44 public unless the party signed it in my presence or where I could see them or they acknowledged them before me. In that way they could come and acknowledge it, that is my signature—I would generally say, is that your signature, and those that were sworn to, I would say, you swear to that. I either had them acknowledge or saw them sign it.

*Brief of Documentary Evidence.*

Claimant the Commercial National Bank, introduced in evidence the following:

The original mortgage dated Feb. 16, 1914, from J. H. Virgin to Commercial National Bank, the original of which is attached as Exhibit "2" and made a part of the proof secured claim filed by Commercial National Bank on Sept. 25, 1914, in said cause, same being a part of the record in this proceeding.

The note referred to in the mortgage for $3,000.00, signed by J. H. Virgin, payable to the Commercial National Bank, dated Feb. 16, 1914, and due Aug. 16, 1914.

Note between same parties dated March 10, 1914, for $3,000.00, due Sept. 10, 1914.

Note between same parties for $500.00, dated April 20th, 1914, due Aug. 20, 1914.

Note between the same parties for $500.00, dated May 4, 1914, due Nov. 4, 1914.

Note between the same parties for $500.00, dated May 19, 1914, due Nov. 19, 1914.

Objector, the Trustee, introduced in evidence the involuntary petition in bankruptcy in said case showing the date of filing of the same to be August 21, 1914, and showing the Commercial National Bank to be one of the petitioning creditors, and showing that E. N. Lewis, the cashier of said bank made the affidavit to the petition.

Objector also offered in evidence the order of adjudication showing September the 3rd, as the date of adjudication, and also
45 record showing the date of the Trustee's qualification to be the 24 day of September, 1914. The schedules of the bankrupt offered in evidence by the objector showing unsecured creditors to the amount of $22,442.97, and showing secured claims to the amount of $12,545.35, and showing assets of the estimated value of $29,684.20. Objector also showed by the Trustee in the course of said hearing that the stock in trade which was scheduled at $23,880.97 was sold by the Trustee at public sale for $8,600.00.

Filed March 13th, 1915.

*Original Claim Commercial National Bank: Objections of Creditors and Trustee, Petition for Review, Filed with Referee's Certificate.*

At Macon, in said District of Georgia, on the 25th day of September, 1914, came E. N. Lewis, of Macon in the County of Bibb, said District of the State of Georgia, and made oath and says that he is agent of the Commercial National Bank of Macon, a National Banking Association, of Macon, of the County of Bibb, State of Georgia, said District, and that he is duly authorized to make this proof, and says that the said J. H. Virgin, the person against whom a petition for adjudication has been filed, was at and before the filing

of said petition, and still is, justly and truly indebted to said Commercial National Bank in the principal sum of $7,500.00, besides interest thereon; that the consideration of said debt is money furnished to the said J. H. Virgin by the said Commercial National Bank of Macon, and that the same consists of five notes, copies of which are hereto attached, and a certain mortgage the original of which is hereto attached; that the original amount of said notes was $7,500.00; that no part of said debt has been paid; that
46 there are *not* setoffs or counter-claims to same; that two of said notes are due as will appear upon the face of same and three have become due on account of the bankruptcy proceedings herein, and that no judgment has been obtained on said notes; that the said Commercial National Bank has not, nor have any persons by its order or to knowledge or belief of this deponent for its use had or received any manner of security for said debt whatever, save and except as follows:

On February 16th, 1914, said J. H. Virgin executed and delivered to said Commercial National Bank his certain mortgage securing said indebtedness of $7,500.00 hereinbefore described, conveying the following property, to wit:

"All that stock of merchandise consisting of all forms and kinds of gold and silverware, glass and china, watches, clocks, and every other kind of merchandise, including furniture and fixtures of every kind and description, and now contained in the brick store building known as number 364 Second Street of Macon, Georgia."

Said mortgage above described being recorded in the Clerk's office of Bibb Superior Court on August 20, 1914, in book 196, page 700.

Said mortgage is the highest and best lien upon the property described therein for the amount stated in this proof.

Said Commercial National Bank and affiant for said Commercial National Bank, therefore, prove this claim as a secured claim against the property described and the proceeds of said property in the event the same should be sold.

E. N. LEWIS.

Sworn to and subscribed before me, this Sept. 25, 1914.

W. R. ROGERS, Jr.,
*Notary Public, Bibb County, Georgia.*

Filed Sept. 25, 1914, J. N. Talley, Referee.

47 *Mortgage—With Waiver of Homestead.*

STATE OF GEORGIA,
*Bibb County:*

This indenture, made this 16th day of February in the year of our Lord One Thousand Nine Hundred and Fourteen between J. H. Virgin of the County of Bibb and State of Georgia, of the one part, and Commercial National Bank, a corporation, of the County of Bibb and State of Georgia of the other part:

Witnesseth, That the said J. H. Virgin has made and delivered

to the said Commercial National Bank, a certain Promissory Note subscribed with his hand and bearing date as herein stated:

Note of $3,000.00 of even date herewith and due August 16, 1914, and bearing interest from date @ 8% per annum.

This mortgage is intended to secure said note and any renewals of extension of said note and to secure any other notes signed by said party of the first part and held by said party of the second part up to $7,500.00.

Now, for and in consideration of the sum of Five Dollars, by the said party of the Second Part to the said party of the First Part in hand paid, the receipt whereof is hereby acknowledged, as well as for the better securing the payment of the aforesaid Promissory Note the said J. H. Virgin hath granted, bargained and sold, and doth by these presents grant, bargain and sell unto the said Commercial National Bank of Macon its successors and assigns, the following property, to-wit:

All that stock of merchandise consisting of all forms and kinds of gold and silverware, glass and china, watches, clocks and every other kind of merchandise including furniture and fixtures of every kind and description and now contained in the brick store building known as number 364 Second Street of Macon, Ga.

48 This mortgage is to attach to and become a lien upon all future purchasers of merchandise made for the purpose of replenishing stock in the usual course of trade, said stock changing in specifics. It is understood, contracted and agreed between parties hereto, that this mortgage is given not only to secure said notes herein previously described, but any renewal or renewals of said notes as well. It is also understood, contracted and agreed between the parties in the event default shall be made in the payment of anyone of said notes when due, each and all of said notes remaining unpaid at the time of said default shall thereon immediately become due and collectible without regard to date of their respective maturities.

To have and to hold, said bargained property to the said Commercial National Bank, its successors and assigns, to its own proper use, benefit and behoof, forever. And the said J. H. Virgin for himself, heirs, executors and administrators, the said bargained property unto the said Commercial National Bank will warrant and forever defend against the claim of himself and his heirs, and against the claim of all other persons whatever.

And for the consideration aforesaid, the said J. H. Virgin for himself and family, and for any and all other person or persons claiming in and through them do hereby solemnly waive and renounce in favor of said debt, evidenced by the Promissory Notes aforesaid, all right of Homestead and exemption in and to any and all of the property hereby conveyed, and do covenant and agree not to take, nor consent to the taking, or attempting to take, any Homestead or Exemption now allowed by law, or which may hereafter be allowed, against the debt aforesaid.

Provided, nevertheless, That the said J. H. Virgin, heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the said Commercial National Bank its successors and

assigns, the sum of money in said Note specified, and interest that may accrue thereon, on the day and at the time mentioned and appointed for the payment thereof in the said Promissory Note mentioned, with lawful interest for the same, according to the
49 tenor and effect of said Note, then and from thenceforth, as well this present indenture and the right to the said property thereby conveyed, as well as the said Promissory Note, shall cease, determine and be void to all intents and purposes.

In testimony whereof, The said J. H. Virgin has hereunto set his hand and affixed his seal the day and year above written.

J. H. VIRGIN. [SEAL.]

Signed, sealed and delivered in presence of:

J. M. DEBORDE,
*Notary Public, Bibb Co., Ga.*

Filed for record 9 A. M., Aug. 20, 1914, Georgia, Bibb County. Clerk's office, Superior Court. Recorded in Book 196, Folio 700, Aug. 20th, 1914. R. F. Hunter, Dep. Clerk.

Filed March 13, 1915. L. M. Erwin, Deputy Clerk.

*Objections of J. P. Stevens Engraving Company to Proof of Secured Claim of Commercial National Bank.*

Now comes J. P. Stevens Engraving Company, a corporation, and respectfully shows to the Court the following facts:

1. That it is a creditor of the bankrupt J. H. Virgin to the amount of One Hundred Ninety & 40/100 ($190.40) Dollars, having proved its claim, and filed the same on August 31, 1914.

2. Petition files this its objections to the proof of secured claim filed by the Commercial National Bank to the amount of Seventy-five Hundred ($7,500.00) Dollars and interest, said claim
50 being filed on September 25, 1914, on a mortgage dated February 16, 1914, said mortgage covering all the stock of goods of the bankrupt including fixtures, and said claim purporting to be a secured claim against the property described in said mortgage, and the proceeds of said property, in the event the same should be sold.

3. Petitioner objects to said proof of claim as a secured claim and objects to said mortgage as being evidenced by a secured creditor, and prays that the Court will disallow said mortgage and said claim of the Commercial National Bank of Macon, Georgia, as a secured claim against said bankrupt, for the reason that said mortgage was not recorded more than four months prior to the date of adjudication of bankruptcy of the said J. H. Virgin, said petition for bankruptcy having been filed on August 21st, 1914, and the said J. H. Virgin having been adjudicated a bankrupt on the 3rd day of September, 1914.

4. And petitioner objects to the allowance of said claim as a secured claim for the further reason that the giving of said mort-

gage amounted to a preference between the bankrupt and one of his creditors, and said mortgage was withheld from the record by the Commercial National Bank in order to help the credit of the said bankrupt, J. H. Virgin, and for the reason that if said mortgage had been recorded when given, it would have injured the credit of the said bankrupt, J. H. Virgin.

5. Petitioner further shows that the Commercial National Bank kept said mortgage from the record for the purpose of bolstering up the credit of said bankrupt, J. H. Virgin, the mortgagor in said mortgage, knowing that he was insolvent at the time. For this reason said mortgage is fraudulent, null and void as to all of the creditors of the said bankrupt.

6. Petitioner further shows that the Attorneys who represented the Commercial National Bank, one day before the filing in this Court of an invo-untary petition against said bankrupt, had
51 said mortgage recorded; that petitioner and the other creditors did not know of the existence of said mortgage previous to the date of this record; that the recording of the same and the keeping of the same from record was a preference that should not be allowed by this Court, and said mortgage, as a priority in law, should be denied.

7. Wherefore, petitioner shows that said mortgage amounts to a preference and is fraudulent in law, and is null and void as to the other creditors of said bankrupt.

Petitioner prays that these, its objections, be inquired into and sustained, and that the petition of the Commercial National Bank aforesaid, asking that said claim under said mortgage be allowed as a secured claim, be denied.

Petitioner prays further that the trustee in bankruptcy of said bankrupt be permitted and required by the Court to intervene in this petition, and be made a party plaintiff, and that such other creditors as desire to intervene and be made party plaintiffs in this petition, be allowed to do so.

FEAGIN & HANCOCK,
*Petitioner's Attorneys.*

GEORGIA, *Fulton County:*

Before me, a Notary Public in and for said County and State, duly authorized by law to administer oaths, personally appeared J. P. Stevens, who on oath deposes and says that he is the President of the petitioner in the foregoing petition, the J. P. Stevens Engraving Company, a corporation, and that the facts stated in the foregoing petition are true so far as they come within his own knowledge, and so far as derived from the knowledge of others, that he believes them to be true.

J. P. STEVENS.

Sworn to and subscribed before me, this 30 day of Sept., 1914.
[SEAL.] J. B. SASSER,
*Notary Public, Fulton County, Georgia.*

Filed Oct. 1, 1914. J. N. Talley, Referee.

52 *Petition of W. E. Martin, Jr., Trustee, to be Made a Party.*

Now comes W. E. Martin, Jr., and shows to the Court the following facts:

1. That he is the trustee of the bankrupt in the above stated case, and desires to be made a party to the objections filed in the above stated matter, and he adopts as his own all the objections urged by the J. P. Stevens Engraving Company heretofore filed in said case to the proof of secured claim of the Commercial National Bank filed in said case.

2. Petitioner prays that he may be made a party in said case, and that said objections be sustained, and that said proof of secured claim be disallowed.

FEAGIN & HANCOCK,
*Attorneys for Petitioner.*
W. E. MARTIN, JR., *Trustee.*

The foregoing petition read and considered, and it appearing to the Court that the trustee in said case is a proper party in said case, it is considered, ordered and adjudged that the foregoing petition of W. E. Martin, Jr., Trustee, to be made a party in said case, be granted, and said Trustee, W. E. Martin, Jr., is hereby made a party plaintiff in said case.

J. N. TALLEY, *Referee.*

Filed Oct. 23, 1914. J. N. Talley, Referee.

To J. N. Talley, Referee in Bankruptcy:

The petition of Wm. Bens Co., a corporation of Providence, R. I., Bassett Jewelry Co., a corporation of Providence, R. I., Non-Retailing Co., a corporation of Lancaster, Pa., S. Cottle Co., a corpora-
53 tion of New York, N. Y., Morris Weil, of New York, N. Y., Williams Link Company, a corporation of Newark, N. J., Frank W. Smith Company, a corporation of Gardner, Mass., and Jennings Bros. Mfg. Co., a corporation of Bridgeport, Conn., shows:

1. That they are creditors of J. H. Virgin, the above stated bankrupt, and that their claims have been duly filed in this Court.

2. That their said claims are unsecured.

3. That petitioners desire to be made parties to the objections filed in the above stated matter by the J. P. Stevens Engraving Company, and adopt as their own all of the objections urged by the same J. P. Stevens Company heretofore filed in said case to the proof of secured claim of the said Commercial National Bank.

Wherefore, petitioners pray that they be made parties in said case, and that said objections be sustained, and that the proof of said secured claim be disallowed.

NAPIER, MAYNARD & PLUNKETT,
*Att'ys for Petitioner.*

GEORGIA, *Bibb County:*

Personally appeared R. G. Plunkett, of the firm of Napier, Maynard & Plunkett, who on oath says that Napier, Maynard & Plunkett are attorneys of record for the above petitioners, and that said petitioners are non-residents and can not make this affidavit, and that the facts and allegations contained in said petition are true.

R. G. PLUNKETT.

Sworn to and subscribed before me this 5th day of Dec., 1914.

CHAS. D. S. CORK,
*Notary Public, Bibb County, Ga.*

The foregoing petition read and considered, and it appearing to the Court that petitioners are proper parties in said case, it
54 is considered, ordered and adjudged that said petition be granted, and that said petitioners be, and are hereby made parties plaintiff in said case. This 5 day of Dec., 1914.

J. N. TALLEY, *Referee.*

Filed Dec. 8, 1914. J. N. Talley, Referee.

*Objections of Trustee et al. to Proof of Alleged Priority of Commercial National Bank.*

Now comes W. E. Martin, Jr., the Trustee in the above stated matter, and by leave of the Court first had amends the objections heretofore filed to the above stated claim for priority, and shows to the Court the following facts as additional reasons why the claim of the Commercial National Bank should not be allowed as a priority in said case:

1. The said paper claimed to be a mortgage was never filed for record as required by the laws of Georgia, in that it has never been marked filed for record and never been entered on the filing docket in the clerk's office of Bibb Superior Court, made and provided by law for such papers, to-wit, the filing docket for recording mortgages on personal property, nor is it indexed on the general index in the clerk's office for mortgages.

2. Because said paper claimed to be a mortgage does not conform with the requirements of a mortgage as provided in 3257 of the Code of Georgia, in that, it was not executed in the presence of, and attested by or approved before a Notary Public or Justice of any Court in this State, or a clerk of the Superior Court, and recorded. The witness, J. M. De Borde, who signed said paper as a witness, not having actually seen the bankrupt J. H. Virgin, sign said paper.

55 3. Because also the witness J. M. De Borde was disqualified from acting as a notary and from attesting said paper under the circumstances, he being the paying teller of the Commercial National Bank, the mortgagee in said paper, and his commission as

Notary having been paid for by said bank, and he making no charge to said bank for commissions in witnessing papers for said bank.

4. Because under the bankruptcy law, Sec. 47 A (2), the Trustee is a lien creditor of the Bankrupt, and under the law of Georgia, Code Sec. 3256 to 3261, said paper, if a mortgage, was required to be recorded under the laws of Georgia within the meaning of the Bankruptcy Act, Sec. 60 (*b*) in order to be valid as against the holders of other subsequent liens, and under the Bankruptcy Act, Sec. 60 (*b*) must have been recorded more than four months before the filing of the petition in Bankruptcy, and this alleged mortgage was not recorded until one day before the filing of the petition, and was recorded when the mortgagee knew that the bankrupt was insolvent and knew that the recording of said mortgage would operate as a preference, or had reasonable grounds to believe it, and recorded it to obtain a preference, and knew that under the law of Georgia the recording of it was required in order for the Commercial Bank to make any claim even under said mortgage against the Trustee, and at the time of the recording of said instrument said Com. Nat. Bank or its agents acting therein had reasonable cause to believe that the enforcement of said transfer would effect a preference.

Wherefore, Petitioner prays that this amendment be allowed, and that these his objections be sustained, and that said proof of secured claim be disallowed.

FEAGIN & HANCOCK,
*Attorneys for W. E. Martin, Jr., Trustee.*

W. E. MARTIN, JR.

56 Sworn to and subscribed by W. E. Martin, Jr., before me this 23rd day of Jan'y, 1915.

HUBERT S. RAWLS,
*Not. Publ., Bibb Co., Ga.*

The foregoing petition read and considered and allowed and ordered filed as a part of the record in said case.

This Jan. 25, 1915.

J. N. TALLEY, *Referee.*

Filed Jan'y 25, 1915. J. N. Talley, Referee.

*Petition to Review Claim of Commercial National Bank, to Which Is Attached Proof of Claim, Objections, and Amendments, Filed With Referee's Certificate on Review.*

To the Honorable J. N. Talley, Referee in Bankruptcy:

The petition of W. E. Martin, Jr., as trustee in the above stated Bankruptcy case, and of J. P. Stevens Engraving Company, a corporation, and a creditor of said bankrupt who filed the original objections, and of the following creditors of said bankrupt who intervened in said objections, and were made parties, to wit:

Wm. Bens Co. a corporation of Providence, R. I.;
Bassett Jewelry Co., a corporation of Providence, R. I.;
Non-Retailing Co., corporation of Lancaster, Pa.;
S. Cottel Co., corporation of New York, N. Y.;
Morris Weil, corporation of New York, N. Y.;
William Link Co., corporation of Newark, N. J.;
Frank W. Smith Co., corporation of Gardner, Mass.;
Jennings Bros. Mfg. Co., corporation of Bridgeport, Conn., respectfully show:

57 1. That W. E. Martin, Jr., is the duly elected and qualified trustee in the above stated case, and by his petition filed on October the 23rd, 1914, in said case, was regularly made a party to the objections of J. P. Stevens Engraving Company, the original objecting creditor in said case.

2. That J. P. Stevens Engraving Company is a creditor of the bankrupt, J. H. Virgin, and has duly filed and proved its claim in said case, and on October 1st, 1914, filed the original objections to the proof of the secured claim of the Commercial National Bank in said case.

3. That William Bens Co., Bassett Jewelry Co., Non-Retailing Company, S. Cottel Company, Morris Weil, William Link Company, Frank W. Smith Company, and Jennings Bros. Mfg. Company are creditors of said bankrupt, having proven their claims, and having intervened in said cause, and having been made parties plaintiff to the original objections in said case on the 5th day of December, 1914.

4. That on September 25, 1914, the Commercial National Bank of Macon, filed a proof of claim in which they set up a mortgage for seventy five — ($7500.00) dollars principal, besides interest thereon, against said estate, claiming that said debt was entitled to priority of payment. Your trustee and creditors objected to the allowance of this claim as a claim entitled to preference or priority in payment on the following grounds:

(*a.*) Because the said mortgage was never properly executed and attested, in that the same was not executed in the presence of, and attested by a Notary Public, as required by the laws of the State of Georgia.

(*b.*) Because the said mortgage was never filed for record and recorded as required by the laws of Georgia, in that the same was never marked—"filed for record" nor entered on the filing docket for the recording of mortgages on personalty in said County.

58 (*c*) Because the Notary Public who signed the said mortgage as a Notary was not a competent attesting witness for that he was the paying teller for said payee, and his commission as a Notary had been paid by said bank, and he made no charges for his services in witnessing any papers for said bank.

(*d.*) Because the said mortgage was a preference under the bankruptcy law at the time it was recorded as the said bankrupt was then insolvent; the payee recording the mortgage knew, or had reason to believe, that he was insolvent and that the recording of the mortgage would operate as a preference and there being no

present consideration at the time the mortgage was recorded; record of the mortgage being required under Sec. 47, *a*2 of the Bankruptcy Act in order for the said mortgage to be good as against the Trustee in Bankruptcy, and it being further necessary under the provisions of 60B of said Act, that the said mortgage should have been recorded more than four months before bankruptcy; or, if recorded during this four months' period that the bankrupt then be solvent, or the mortgagee at least have no reasonable cause to believe that he was insolvent, and no reasonable cause to believe that the enforcement of the transfer would effect a preference.

(*c.*) Because the said mortgage was withheld from record by the payee for the purpose of bolstering the credit of the bankrupt and was, for that reason, fraudulent and void as to creditors.

5. That on February 2, 1915, the said Referee having heard evidence and argument of the issue made by the proof and objections, held the mortgage valid and allowed the same as a preferred or, priority claim, his order passed thereon being as follows:

"It is, upon consideration, ordered that the objections of the Trustee and creditors to the proof of secured claim of the Commercial National Bank be, and they are hereby overruled, and said
59 claim is hereby allowed as a secured claim, entitled to payment in full out of the proceeds, arising from the sale of the stock of merchandise, furniture and fixtures described in said mortgage, and sold by the Trustee of the above bankrupt.

This February 2, 1915.

J. N. TALLEY,
*Referee in Bankruptcy.*

6. Your petitioners show that such order was, and is erroneous for the following reasons:

1. Because the same is contrary to law.
2. Because the same is contrary to the evidence.
3. Because the same is against the weight of evidence and without evidence to support it.
4. Because under the law and the evidence the said mortgage is a preference and invalid under the provisions of Sec. 60, 1, and 47 *a*2 of the Bankruptcy Act.
5. The said mortgage was invalid because never properly executed and attested, in that the Notary Public who signed the same was an employee of the bank who took the mortgage, and had his appointing fee paid by the bank and made them no charges for witnessing their papers, and for the further reason that said mortgage was not signed in the presence of this Notary.
6. Because the said mortgage was never properly filed and recorded in the clerk's office of Bibb Superior Court, in that the same was never indexed in the book provided by law for that purpose.
7. Because the said mortgage was fraudulent and void as to creditors in that it was taken by the bank at a time when the bankrupt was insolvent, and the bank had reasonable cause to believe that

he was insolvent, and was withheld from record by them at his request for the purpose of bolstering his credit.

60 Wherefore, Your petitioners feeling aggrieved because of the order herein, prays that the same may be reviewed as provided in the bankrupcy law of 1898, and in general order No. 27.

FEAGIN & HANCOCK,
*Attorneys for W. E. Martin, Jr., Trustee of the Estate of J. H. Virgin, and Attorneys for J. P. Stevens Engraving Co., the Original Objecting Creditor.*

NAPIER, MAYNARD & PLUNKETT,
MALLARY & WIMBERLY,
*Attorneys for William Bens Company, Bassett Jewelry Co., Non-retailing Co., S. Cottle Co., Morris Weil, William Link Co., Frank W. Smith Co., and Jennings Bros. Manufacturing Company, Intervening Creditors.*

GEORGIA,
*Bibb County:*

Personally appeared W. E. Martin, Jr., who on oath says that he as Trustee is one of the petitioners mentioned in the described and foregoing petition, and that the statements of fact contained in the said petition are true.

W. E. MARTIN, Jr.

Sworn to and subscribed before me this 15th day of February, 1915.

J. A. McMANUS,
*Notary Public, Bibb County, Georgia.*

Filed Feb. 15, 1915. J. N. Talley, Referee.
Filed March 13th, 1915. L. M. Erwin, Deputy Clerk.

61 *Opinion of the Court.*

Claim of Commercial National Bank.

Petition to Review Decision of Referee Allowing Mortgage of Commercial National Bank as a Priority. Filed by Trustee at Macon, Ga., May 27th, 1915. Decided June 15th, 1915.

Appearances:

For the Trustee: Feagin & Hancock, by Mr. R. D. Feagin.
For certain creditors: Mallary & Wimberly, by Mr. R. S. Wimberly.
For American National Bank, liquidating agent of Commercial National Bank: Hardeman, Jones, Park & Johnston, by Mr. Orville A. Park.

SPEER, *District Judge:*

The question before the Court involves the validity of a mortgage to secure $7,500.00. This was executed by Mr. Virgin, at the time a dealer in jewelry. It was given to the Commercial National Bank to secure the amount named and covered the entire stock of merchandise of the mortgagor. At the time, which was more than four months antecedent to bankruptcy, Mr. Virgin was on the verge of insolvency. It is not made plain that this was known to him or to the Commercial National Bank, the mortgagee. The mortgage was indeed made to obtain the sum involved in order that it might be paid on the existing debts of Mr. Virgin's creditors. This was done. It is true that Mr. Virgin requested the Bank not to record the mortgage. It is equally true that no such promise was made him. To the contrary it was expressly stipulated contemporaneously with the creation of the debt that he should make no further purchases on credit, and should reduce his stock as far as possible. Subsequently, he did however, make certain additional purchases which it is stated amounted to about five hundred dollars. The
62 Commercial National Bank becoming involved, transferred its assets and other values to the American National Bank, which undertook the liquidation of the Commercial. Mr. Virgin now applied to the American National Bank for additional credit. This was declined him and the Commercial was directed by the American to proceed to collect the debt. The mortgage was recorded on one day, and the next the proceeding in bankruptcy was filed. The Trustee now assails the mortgage as defectively executed, as a preference to the Commercial National Bank, and as fraudulent against the general creditors. The Referee, after full hearing, has passed on all of these questions and has filed a report negativing them, which is noteworthy for clearness and completeness. Exceptions thereto have been filed by the Trustee and then the issues are presented.

The execution of the mortgage, cannot, we think, be declared in-

valid for the reason assigned, namely; that it was attested by a Clerk in the Commercial National Bank who was also a Notary Public. Said the Georgia Court of Appeals in Betts Evans Trading Co. vs. Bass, 2nd vol. pages 718 to 721: "We do not see that a clerk who has no interest conditional upon the profits might not, as notary public, attest deeds, mortgages, or conditional bills of sale, in behalf of his employer, or that a cashier or other officer of a bank, who owns no stock therein might not do the same thing." The Court adds, "though this would be doubtful propriety." The view of the State Court as to validity, and not propriety, must be regard- as controlling here.

Nor can we assent to the contention of the exceptors that the notary must attach a formal certificate of his acknowledgment to the mortgage. "Attestation is the act of witnessing the actual execution of a paper and subscribing one's name as a witness to it. Acknowledgement is the act of a grantor in going before some competent officer and declaring the paper to be his deed." White vs. Margarahan, 87 Ga., 217, 219; See also Baxley vs. Baxley 117 Ga. 60. This rule of the Georgia Court — expressive of the general law. "The act of witnessing an instrument of writing at the request of
63 the party making the same and subscribing it as a witness, is attestation." Bouvier's Law Dictionary, Title, "Attestation." See also 1st Words and Phrases, page 628.

Nor is the contention maintainable that the mortgage itself is altogether void because it was preferential. It was given for an actual loan of $7,500. There was no intention to create a preference. The facts indicate that both Mr. Virgin and the Commercial Bank believed that he was solvent. The mortgage was executed more than four months prior to bankruptcy and was actually recorded before bankruptcy, though within four months. So far from there being an agreement or tacit understanding that the mortgage was to be withheld from record to the injury of subsequent creditors, it was expressly stipulated that no subsequent credit should be obtained. Now the Code of Georgia provides: "Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage." Code 1910, Sec. 3260. There are many authorities in support of this statutory principle. In re Williams, 120 Fed. 542; Doody Co. vs. Adams, 123 Fed. 1007; Robinson vs. Woodmansee, 80 Ga. 249; Dickinson, Trustee, vs. Stultz, 120*m* Ga. 632. The Fifth Circuit Court of Appeals has held that "neglect to promptly record a mortgage is not of itself fraudulent as against other creditors of the mortgagor." Bean vs. Orr, 182 Fed. 599. See also Meyer Bros. Drug Co. vs. Pipkin Drug Co., 136 Fed. 396. This was a Texas case, where the provisions of the statute are identical with those of Georgia. Besides the execution of the mortgage which was made in entire good faith, antedated the preferential period.

Nor does the amendment to the Bankruptcy law of 1910, which clothed the Trustee with all the rights, remedies and powers of a

creditor holding a lien by legal or equitable proceedings (par. 47-*a* as amended) change the status. The Trustee could not have any lien of any sort before he became Trustee, and before that date the mortgage was recorded, and is, therefore, prior to any lien this
64 amendment created, See in re Jacobson & Perrill, 200 Fed. 812. There it was held, "The lien of a bankrupt's Trustee conferred by the Bankruptcy Act as amended in 1910, does not relate back to a period four months prior to the institution of bankruptcy proceedings, nor can it antedate the institution of such proceedings." See also Keeble vs. John Deere Plow Co., 190 Fed. 1019. And again by the Circuit Court of Appeals for the Fifth Circuit, it was held, "where the mortgage was given for a valid consideration, and not to hinder, delay or defraud the creditors and not having been withheld from record with fraudulent intent, and having been recorded before the lien of the bankrupt's Trustee attached, it was valid against him." Anderson vs. Chenault, 208 Fed. 400. An attempt to review this case, originally decided in this District, was denied by the Supreme Court of the United States, 236 U. S., 700. U. Adv. Ops. 201.

In view of these considerations we must hold that in the main, the decision of the Referee must stand. It is however, true that a bankruptcy Court is a Court of Equity. In such a Court it is competent as between the parties before it, to afford redress to those who have been injured, where one party with a full opportunity to avoid the result has put it in the power of another to do injury to a third. The facts here seem to justify the application of this principle. It is true that the Commercial Bank declined the request of Mr. Virgin to withhold the mortgage from record. It is true that an agreement was reached that he should obtain no additional credits, and that he should pay cash for everything bought. But the mortgage was not in fact recorded. In fact, additional purchases, seemingly not in large amount were made on credit. Had record been made, this would have been impossible, or if possible, the vendor would have had at least constructive notice. It seems, therefore, that the creditors whose debts were created after the execution of the unrecorded mortgage, and before the actual record, are entitled to an equity equivalent to that of the mortgagee. This seems plain from
65 the Georgia statute, Code 1910, par. 3260, supra: "Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage." This was the rule established by the Circuit Court of Appeals for the Fifth Circuit, 121 Fed. 630, opinion by the late Judge Shelby, cited in re Jacobson & Perrill, 200 Fed. 812. Decision by District Judge Newman. Said that learned Judge, on page 817: "A mortgage may be free from fraud in the beginning and may become fraudulent by the conduct and act of the parties afterward." Although Goldstein Brothers took this mortgage in good faith, for a present consideration at the time it was taken, their subsequent action, or rather their non-action and their silence when they should have spoken, must, in my opinion render this mortgage invalid as

against creditors who sold goods and put them in the bankrupt stock before the record of the mortgage and without the knowledge of the existence of the same." There Judge Newman, doubtless, used the word "fraudulent" because he adds, "I think it is perfectly clear from this record that the mortgage was intentionally withheld from record." Here it is not necessary to impute fraud. It is sufficient to say that the non-action of the mortgagee, the Bank, in its failure to record the mortgage will be presumed to have misled the creditors who actually sold to the mortgagor between the execution of the mortgage and the date of its record. Therefore such creditors are entitled to pro-rate in the distribution of the assets on equal terms with the mortgagee and the bank which is its liquidating agent.

Therefore, a decree will be ordered directing the affirmance of the Referee's findings, save as to the creditors of this class. A re-reference will also be directed and the Referee directed to ascertain the amount of such valid claims and permit the holders to pro-rate equally with the Bank in the application of the values arising from the sale of the mortgaged assets.

Filed June 19, 1913. Cecil Morgan, Deputy Clerk.

66 *Order on Intervention of Commercial National Bank of Macon.*

This matter coming on for hearing upon a petition to review the report and findings of the Referee, after argument of counsel, upon consideration thereof, the Court being fully advised,

It is ordered and decreed, for the reasons in the opinion filed stated, that the findings and order of the Referee — affirmed and be made the judgment and decree of the Court, save as is hereinafter modified.

It is further ordered that the claim of the intervener, the Commercial National Bank of Macon, be allowed as a secured claim entitled to preference and priority of payment out of the funds in the hands of the Trustee derived from the sale of the mortgaged property, save and except as to such creditors of the bankrupt as may have extended credit to the bankrupt without notice of the said mortgage between the date upon which the said mortgage was executed and the date of the record thereof, as to which creditors the said mortgage is not entitled to priority; the report and findings of the Referee being modified to this extent; and except as herein modified, said report is affirmed in all respects.

So ordered, this 22nd day of June, 1915.

EMORY SPEER,
*U. S. Judge.*

Filed June 22, 1915. Cecil Morgan, Deputy Clerk.

67 *Præcipe for Transcript to the Clerk of the Above Entitled Court.*

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the 5th Judicial Circuit under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings, and papers on file to-wit:

1. Proof of secured claim of Commercial National Bank, with mortgage attached.

2. Objections of J. P. Stevens Engraving Co. to said claim.

3. Petition of Trustee to be made a party to said objections and order thereon.

4. Intervention of William Bens Co. with order thereon.

5. Amendment to objections filed by Trustee and order thereon.

6. Finding of facts of the Referee on the hearing of the objections and summary of the evidence.

7. Opinion of the Referee.

8. Certificate of the Referee.

9. Petition to revise and review the Referee's findings filed by the Trustee, et al.

10. Opinion of the Court on petition to review.

11. Judgment and decree of the Court entered June 22, 1915.

68 Said transcript to be prepared as required by law, and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the 5th Circuit, and on file in the office of the Clerk of said Circuit Court of Appeals at New Orleans, La., now in force.

R. D. FEAGIN &
O. C. HANCOCK,
*Attorneys for W. E. Martin, Jr., Trustee and Attorneys for J. P. Stevens Engraving Co., the Original Objecting Creditor.*

NAPIER, MAYNARD & PLUNKETT,
MALLARY & WIMBERLY,
*Attorneys for William Bens Co., Bassett Jewelry Co., Non-Retailing Co., S. Cottel Co., Morris Weil, William Link Co., Frank W. Smith Co., and Jennings Bros. Mfg. Co., Intervening Creditors.*

The foregoing Præcipe is approved as setting forth all the pleadings, proceedings and papers on file in said cause, which are neces-

sary to said appeal and to a clear understanding of the errors complained of.

ORVILLE A. PARK,
GEO. S. JONES,
*Attorneys for Commercial National Bank,*
*Defendant in Error.*

Approved:

EMORY SPEER,
*United States Judge.*

Filed June 30th, 1915. L. M. Erwin, Deputy Clerk.

69 *Petition for Appeal, Order Allowing Appeal, and Supersedeas.*

Petition to review decision of the Referee filed by the Trustee, W. E. Martin, Jr., and by certain creditors, to wit:

J. P. Stevens Engraving Co.,
William Bens Company,
Bassett Jewelry Company,
Non-Retailing Company,
S. Cottel Company,
Morris Weil,
William Link Company,
Frank Smith Company,
Jennings Bros. Manufacturing Company,

against allowance of mortgage of Commercial National Bank as a priority.

*Petition for Appeal.*

To the Honorable Emory Speer, Judge of said Court:

W. E. Martin, Jr., the Trustee, in the above stated case, and J. P. Stevens Engraving Co., William Bens Co., Bassett Jewelry Co., Non-Retailing Co., S. Cottel Co., Morris Weil, William Link Co., Frank Smith Co., and Jennings Bros. Mfg. Co., objecting creditors of said bankrupt, feeling themselves aggrieved by the judgment and decree made and entered in this cause on the 22nd day of June, 1915, sustaining the finding of the Referee, allowing said secured claim, do hereby appeal from said judgment and decree to the Circuit Court of Appeals for the 5th Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said

judgment and decree was based, duly authenticated, may be
70 sent to the United States Circuit Court of Appeals for the 5th Circuit, sitting at New Orleans, and prays that with the allowance of the appeal a supersedeas be issued as provided by law.

(Signed) R. D. FEAGIN &
O. C. HANCOCK,
*Attorneys for W. E. Martin, Jr., Trustee, and J. P. Stevens Engraving Company, Original Objecting Creditor.*

(Signed) H. V. NAPIER, Jr.,
E. W. MAYNARD,
R. G. PLUNKETT,
R. S. WIMBERLY,
E. P. MALLARY,
*Attorneys for William Bens Company, Bassett Jewelry Company, Non-Retailing Company, S. Cottel Company, Morris Weil, William Link Company, Frank Smith Company, Jennings Bros. Mfg. Co. Intervening Creditors.*

The foregoing petition granted and appeal allowed and shall operate as a supersedeas.

Done in open Court this 30th day of June, 1915.

EMORY SPEER,
*U. S. Judge.*

Filed June 30th, 1915. L. M. Erwin, Deputy Clerk.

71 *Bond on Appeal.*

Know all men by these presents that we: J. P. Stevens Engraving Co. a corporation of Atlanta, Ga.; William Bens Co., a corporation of Providence, R. I.; Bassett Jewelry Co., a corporation of Providence, R. I.; Non-Retailing Co., a corporation of Lancaster, Pa.; S. Cottel Co., a corporation of New York, N. Y.; Morris Weil, a corporation of New York, N. Y.; Morris Link Company, a corporation of Newark, N. J.; Frank W. Smith Company, a corporation of Gardner, Mass.; Jennings Bros. Manufacturing Co., a corporation of Bridgeport, Conn., as principals, and American Surety Co. as Surety are held and firmly bound unto the Commercial National Bank in the full and just sum of $500.00, to be paid to the said Commercial National Bank, its attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally and firmly by these presents.

Sealed with our seals, and dated this 29th day of June, 1915.

Whereas, later at a session of the District Court of the United States for the Western Division of the Southern District of Georgia in the matter pending in the cause of J. H. Virgin, bankrupt in bank-

ruptcy, between W. E. Martin, Jr., Trustee of said bankrupt, and J. P. Stevens Engraving Co., Bassett Jewelry Co., Non-Retailing Co., S. Cottel Co., Morris Weil, William Link Co., Frank W. Smith Co., Jennings Bros. Mfg. Co., and the Commercial National Bank of Macon, Ga., the matter at issue being the proof of a preferred claim on a mortgage held by the Commercial National Bank and executed to it by said bankrupt, and the Trustee and other creditors herein named as principals in this bond having filed objections to said preferred claim and, subsequently filed a petition to review Referee's
72 findings, allowing said claim as a priority, and whereas, a decree was rendered against the Trustee and the objecting creditors in said cause on the 22nd day of June, 1915, in said Court, and having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the 5th Circuit to reverse the decree in the aforesaid suit, and a citation directed to the said Commercial National Bank, and their Attorneys of Record, is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the 5th Circuit to be holden at New Orleans, La.

Now, therefore, the condition of the above obligation is such that if the said J. P. Stevens Engraving Co., William Bens Co., Bassett Jewelry Co., Non-Retailing Co., S. Cottel Co., Morris Weil, William Link Co., Frank W. Smith Co., and Jennings Bros. Co., shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation is to be void, other to remain in full force and virtue:

J. P. STEVENS ENGRAVING CO.,
By FEAGIN & HANCOCK, [SEAL.]
*Its Att'ys at Law.*

WILLIAM BENS CO.,
By NAPIER, MAYNARD & PLUNKETT, & MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys at Law.*

BASSETT JEWELRY CO.,
By NAPIER, MAYNARD & PLUNKETT, & MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys at Law.*

NON-RETAILING CO.,
By NAPIER, MAYNARD & PLUNKETT, & MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys of Record.*

S. COTTEL CO.,
By NAPIER, MAYNARD & PLUNKETT, & MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys at Law.*

73 MORRIS WEIL,
By NAPIER, MAYNARD & PLUNKETT, & MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys at Law.*

WILLIAM LINK CO.,
By NAPIER, MAYNARD & PLUNKETT, &
MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys at Law.*
FRANK W. SMITH CO.,
By NAPIER, MAYNARD & PLUNKETT, &
MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys at Law.*
JENNINGS BROS. MFG. CO.,
By NAPIER, MAYNARD & PLUNKETT, &
MALLARY & WIMBERLY, [SEAL.]
*Its Att'ys at Law.*
AMERICAN SURETY CO.,
A. EMMETT BARNES, JR., [SEAL.]
*Res. Vice-Pres.*
[SEAL.] R. G. PLUNKETT, [SEAL.]
*Res. Ass't Sec.*

Sufficiency of surety on the foregoing bond approved this 30th day of June, 1915.

EMORY SPEER, *Judge.*

Filed June 30, 1915. L. M. Erwin, Dep'y Clerk.

*Assignment of Errors on Appeal.*

And now on the 30th day of June, 1915, came the Trustee W. E. Martin, Jr., in the above stated case, and J. P. Stevens Engraving Company, Objecting Creditor, by their attorneys Feagin & Hancock, and William Bens Co., Bassett Jewelry Co., Non-Retailing Co., S. Cottel Co., Morris Weil, William Link Co., Frank Smith Co. and Jennings Bros. Mfg. Co., by their attorneys, Napier, Maynard & Plunkett and Mallary & Wimberly, and say that the judgment and decree entered in the above cause on the 22nd day of June, 1915, is erroneous and unjust to them.

74 1. Because said judgment and decree affirms the findings and judgments of the Referee and holds that the mortgage of the Commercial National Bank was valid as a secured claim entitled to priority of payment.

Whereas, under the evidence said mortgage was a preference, and for this reason invalid.

2. Because said judgment and decree affirm the findings of the Referee that said mortgage was valid, because it was not given to hinder, delay or defraud creditors.

Whereas, the evidence in said case shows that the mortgage was invalid as a preference, because recorded by the bank within four months preceding bankruptcy, at a time when the bankrupt was insolvent, and when the bank knew that he was insolvent, and knew or had reason to believe that they were receiving a preference.

3. Because the said judgment and decree, and the said finding of

the Referee is to the effect that the mortgage was valid, because the Trustee was not vested with the rights of a lien holder, under the amendment of 1910 of the Bankruptcy Act until the date of his qualification, which was after the recording of the mortgage.

Whereas, under the law and the evidence, the mortgage was invalid and subject to attack by the Trustee as a preference because recorded within four months prior to bankruptcy, at a time when the bankrupt received no consideration therefor, and when he was insolvent, and the mortgagee knew or had reasonable cause to believe that he was insolvent, and that they were receiving a preference.

4. Because the Referee's finding of fact which was affirmed by said judgment and decree shows that the reason the mortgage was recorded by the mortgagee was because they thought that the bankrupt was insolvent and were apprehensive of loss.

5. Because the Court in its judgment and decree, and the Referee in his findings, which were affirmed by said judgment, decided that the mortgage was not, altogether void, because it was prefer-
75 ential, and in deciding that the amendment to the Bankruptcy law of 1910 which clothed the Trustee with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings (paragraph 47 as amended) did not change the status.

Whereas, under the law and the evidence appellants contended that said mortgage was a preference, and operated as a preference at the time it was recorded, it being recorded within four months preceding bankruptcy, at a time when Virgin was insolvent and when the bank knew, or had reason to believe that he was insolvent, and knew or had reason to believe that the mortgage was a preference, no consideration passing from the Bank to Virgin at the time of the recording of the mortgage, which was executed several months before, and appellants herein say that for this reason the mortgage was invalid and should have been held by the Court to be invalid, and says that the Court erred in not holding the same invalid for this reason, and in not reversing the findings of the Referee, appellants having objected to the allowance of said claim and mortgage upon the grounds herein set forth, to wit, that said mortgage was a preference and invalid under the provisions of Section 60 (1) and 47 (*a*-2) of the Bankruptcy Act, record of the mortgage being required under Section 47 (*a*-2) of the Bankruptcy Act, in order for said mortgage to be good as against the Trustee in Bankruptcy, and it being necessary under the provisions of 60 (B) of said Act that said mortgage should have been recorded more than four months before the bankruptcy, or if during this four months' period that the bankrupt then be solvent, or the mortgagee at least have no reasonable cause to believe that he was insolvent, and no reasonable cause to believe that the enforcement of the transfer would effect a preference.

6. Because the said judgment and decree of the Court is to the effect that the mortgage was valid as to the Trustee, and as to all creditors who extended credit before the execution of the mortgage,

but further held that said mortgage was invalid as to those creditors who extended credit to the bankrupt between the date of the
76 execution of the mortgage and the date of the actual record of the mortgage, and because the Court held that nonaction on the part of the mortgagee in recording the mortgage had the effect of rendering the mortgage invalid as to some of the creditors, and did not hold that this non action on the part of the mortgagee in recording the mortgage rendered it invalid as to all creditors.

Whereas, under the law and the evidence, appellants contend that said mortgage was invalid and void as to preference, and as fraudulent as to the Trustee and as to all the creditors.

Wherefore, appellants as objectors to the allowance of said claim in the proceedings brought, and as appellants herein, pray that said decree and judgment be reversed, and the District Court directed to enter a judgment reversing the findings of the Referee, and holding said mortgage invalid and said claim secured by said mortgage invalid as a priority.

R. D. FEAGIN &
O. C. HANCOCK,

*Attorneys for W. E. Martin, Jr., Trustee, and J. B. Stevens Engraving Co., Original Objecting Creditor.*

H. V. NAPIER, Jr.,
E. W. MAYNARD,
R. G. PLUNKETT,
E. P. MALLARY,
R. S. WIMBERLY,

*Attorneys for William Bens Company, Bassett Jewelry Company, Non-Retailing Company, S. Cottel Company, Morris Weil, William Link Company, Frank Smith Company, Jennings Bros. Mfg. Co., Intervening Creditors.*

Filed June 30, 1915. L. M. Erwin, Deputy Clerk.

* * * * * * *

77 *Petition for Appeal.*

To Honorable Emory Speer, Judge of said Court:

Commercial National Bank of Macon, Georgia, feeling itself aggrieved by the judgment and decree made and entered in this cause on the 22nd day of June, 1915, holding as to creditors who may have extended credit to the bankrupt without notice of the mortgage held by the Commercial National Bank of Macon, Georgia, between the date upon which the said mortgage was executed and the date of the record thereof, said mortgage is not entitled to priority, and modifying the report and findings of the Referee to the extent stated, does hereby appeal from said judgment and decree to the Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and it thereupon prays that

its said appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and decree to the Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and it thereupon prays that its said appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment and decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, that the errors alleged to have been committed may be considered and corrected.

GEO. S. JONES,
ORVILLE A. PARK,
BRUCE C. JONES,
*Attorneys for Commercial National Bank of Macon, Georgia.*

The foregoing petition granted, and appeal allowed, this 1st day of July, 1915.

EMORY SPEER,
*U. S. Judge.*

Filed July 1st, 1915. L. M. Erwin, Deputy Clerk.

78 *Bond on Appeal.*

Know all men by these presents: That we, Commercial National Bank of Macon, Georgia, as principal, and R. J. Taylor as surety, are held and firmly bound unto W. E. Martin, Jr., Trustee, and J. P. Stevens Engraving Company, William Bens Company, Morris Weil, Bassett Jewelry Company, Non-Retailing Company, S. Cottel Company, William Link Company, Frank W. Smith Company and Jennings Brothers Manufacturing Company in the just and full sum of three hundred ($300.00) dollars, to be paid to the said obligees, their successors, executors, administrators, jointly and severally and firmly by these presents;

Sealed with our seals, and dated this 1st day of July, 1915.

Whereas, at a session of the District Court of the United States for the Western Division of the Southern District of Georgia in the matter pending in the cause of J. H. Virgin, bankrupt, in bankruptcy, between W. E. Martin, Jr., Trustee of said bankrupt, and J. P. Stevens Engraving Co., Wm. Bens Co., Bassett Jewelry Co., Non-Retailing Co., S. Cottel Co., Morris Weil, William Link Co., Frank W. Smith Co., Jennings Bros. Mfg. Co., and the Commercial National Bank of Macon, Ga., the matter at issue being the proof of a preferred claim on a mortgage held by the Commercial National Bank and executed to it by said bankrupt, and objections to said preferred claim, and whereas a decree was rendered in said cause on the 22nd day of June, 1915, in said Court, and whereas said Commercial National Bank of Macon, Ga., having obtained from said Court an order allowing an appeal to the United States Circuit Court of

Appeals for the Fifth Circuit to reverse the decree in the aforesaid suit, and a citation directed to the said W. E. Martin, Jr., Trustee, J. P. Stevens Engraving Company, Wm. Bens Company, Bassett Jewelry Company, Non-Retailing Company, S. Cottel Company, Morris Weil, William Link Company, Frank W. Smith Company, and Jennings Brothers Manufacturing Company, and their
79 attorneys of record, is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit to be holden at New Orleans, Louisiana;

Now, therefore, the condition of the above obligation is such, that if the said Commercial National Bank of Macon, Georgia, shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation is to be void, otherwise to remain in full force and virtue.

COMMERCIAL NATIONAL BANK OF MACON, GA. [L. S.]
By HARDEMAN, JONES, PARK & JOHNSTON,
*Its Attorneys of Record.*
R. S. TAYLOR. [L. S.]

Attest:
[SEAL.] R. C. SOUDER,
*Notary Public, Bibb County, Ga.*

My Commission expires Feb. 5th, 1919.

Sufficiency of surety on the foregoing bond approved this 1st day of July, 1915.

EMORY SPEER,
*U. S. Judge.*

Filed July 1st, 1915. L. M. Erwin, Deputy Clerk.

*Assignment of Errors on Appeal.*

Comes now the Commercial National Bank of Macon, Ga., appellant herein, and says that the judgment and decree entered in the above stated cause on the 22nd day of June, 1915, is erroneous and unjust to appellant:

80 1. Because said order and decree provides that the mortgage held by the Commercial National Bank of Macon, Ga., is not entitled to priority over such creditors of the bankrupt as may have extended credit to the bankrupt without notice of the mortgage held by the Commercial National Bank of Macon, Ga., between the date upon which said mortgage was executed and the date of the record thereof, whereas under the findings by the Court said decree should have unconditionally affirmed the report and findings of the Referee, and should have allowed said mortgage as a secured claim entitled to preference and priority of payment out of the funds in the hands of the Trustee derived from the sale of the mortgaged property over all the creditors of said bankrupt.

2. Because the Referee having reported and the Court having found that "the facts indicate that both Mr. Virgin and the Commercial Bank believe that he was solvent," and that "here it is not necessary to impute fraud," and that "so far from there being an agreement or tacit understanding that the mortgage was to be withheld from record to the injury of subsequent creditors, it was expressly stipulated that no subsequent credit should be obtained," it was error to hold and decree that any of the creditors are entitled to pro rate in the distribution of the assets on equal terms with the mortgagee and the bank, which is its liquidating agent, and so holding was contrary to law and the findings of fact by the Referee and the District Judge.

3. Because said judgment and decree modified the findings and order of the Referee to the extent of denying preference and priority of payment to the Commercial National Bank of Macon, Ga., upon its mortgage as against creditors of the bankrupt who may have extended credit to the bankrupt without notice of said mortgage between the date upon which the said mortgage was executed and the date of the record thereof;

Whereas, the Court having found that said mortgage was not withheld from record by agreement, and that no fraud was
81 to be imputed on account of the non-record of said mortgage and that the mortgage was given for a present consideration, should have held and decreed that said mortgage was entitled to priority of payment over all the creditors of the bankrupt.

4. Because said Judgment and decree of the Court having held that said mortgage was valid as to the other creditors of said bankrupt, should not have modified the report and findings of the Referee so as to hold that said mortgage was invalid as to those creditors who extended credit to the bankrupt between the date of the execution of the mortgage and the date of the actual record of the mortgage.

5. Because said judgment and decree of the Court was erroneous in that it created a distinction between creditors who extended credit before the record of said mortgage and after the record of said mortgage; appellants contending that under the evidence and the facts as found by the Referee and the District Judge, said mortgage was not fraudulently withheld from record in order to enable the bankrupt to obtain credit, and, therefore, no reason in law or in equity or under the facts so found appears for denying priority to said mortgage creditor as against any of the creditors of said bankrupt.

Wherefore, appellant prays that said decree and judgment be reversed insofar as the same fails to unconditionally affirm the report and findings of the Referee.

GEO. S. JONES,
ORVILLE A. PARK,
BRUCE C. JONES,
*Attorneys for Commercial National Bank of Macon, Georgia, Appellant.*

Filed July 1st, 1915. L. M. Erwin, Deputy Clerk.

82 *Agreement as to Transcript of Record.*

An appeal having been applied for and allowed by W. E. Martin, Jr. as Trustee and the other appellees herein, upon which appeal the appellants and appellee- having agreed upon the portions of the record to be included in the transcript to be sent up with said appeal, and the said transcript, including all of the pleadings, proceedings and papers on file necessary for a proper consideration of the errors complained of in the appeal applied for and allowed by the appellant herein;

It is agreed that no additional transcript need be sent up upon this cross-appeal, and that the transcript on said appeal applied for by W. E. Martin, Jr., as Trustee, et al., shall constitute the transcript on this appeal.

This July 1st, 1915.

GEO. S. JONES,
ORVILLE A. PARK,
BRUCE C. JONES,
*Attorneys for Commercial National Bank, Appellant.*
FEAGIN & HANCOCK,
NAPIER, MAYNARD & PLUNKETT,
MALLARY & WIMBERLY,
*Attorneys for W. E. Martin, Jr., Trustee, et al., Appellees.*

Approved, this 1st day of July, 1915.

EMORY SPEER,
*U. S. Judge.*

Filed July 1st, 1915. L. M. Erwin, Deputy Clerk.

83 SOUTHERN DISTRICT OF GEORGIA, *ss:*

I, Cook Clayton, Clerk of the District Court of the United States for the Southern District of Georgia, do hereby certify that the writing annexed to this Certificate is a true and correct transcript of the record as directed by law to be made and copies of the proofs and of such entries and papers of file prepared in accordance with the praecipe of Attorneys and Solicitors of record in the matter of J. H. Virgin, Bankrupt, in Bankruptcy, on Review of the finding of the Referee allowing the secured claim of the Commercial National Bank of Macon, Georgia, and appealed from the final order and decree of the Court dated June 22nd, 1915, wherein W. E. Martin, Jr., Trustee, et al., are appellants and the Commercial National Bank of Macon are appellees, and wherein on cross appeal the Commercial National Bank of Macon is appellant and W. E. Martin, Jr., Trustee, et al., are appellees, said cause, numbered 1437B lately pending in said District Court for the Western Division of

the Southern District of Georgia, and appealed to the Circuit Court of Appeals for the Fifth Circuit as the same remains of file and of record in my office.

Witness my official signature and the seal of said District Court this 27th day of July, A. D. 1915.

COOK CLAYTON, *Clerk*,
By LENOIR M. ERWIN,
*Deputy Clerk.*

[SEAL.]

84 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

*Argument and Submission.*

Extract from the Minutes of October 5, 1915.

No. 2816.

W. E. MARTIN, JR., Trustee, et als.
versus
COMMERCIAL NATIONAL BANK OF MACON, GEORGIA,

and

COMMERCIAL NATIONAL BANK OF MACON, GEORGIA,
versus
W. E. MARTIN, JR., Trustee, et als.

On this day this cause was called, and, after argument by R. Douglas Feagin, Esq., and R. S. Wimberly, Esq., for appellants and cross-appellees, and Orville A. Park, Esq., for appellees and cross-appellants, was submitted to the Court.

85 *Opinion of the Court. Filed January 4th,* 1916.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 2816.

W. E. MARTIN, JR., Trustee, et al., Appellants,
vs.
COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellee.

COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellant,
vs.
W. E. MARTIN, JR., Trustee, et al., Appellees.

Appeal and Cross-appeal from the District Court of the United States for the Southern District of Georgia.

Oliver C. Hancock, R. Douglas Feagin and R. S. Wimberly (R. G. Plunkett and E. P. Mallary, on the brief), for appellants and cross-appellees.

George S. Jones and Orville A. Park (Hardeman, Jones, Park & Johnston, on the brief), for appellee and cross-appellant.

Before Pardee and Walker, Circuit Judges, and Foster, District Judge.

WALKER, *Circuit Judge:*

In this case an attack is made on a mortgage executed by the bankrupt more than four months before the petition in bankruptcy was filed, but recorded within that period. Section 47*a*, clause 2, of the Bankruptcy Act, as amended in 1910 (36 Stat. 838, 840), provides that the trustee in bankruptcy, "as to all property
86 in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings." Very recently it has been authoritatively decided that under this provision the trustee takes the status of such creditor as of the time the petition in bankruptcy is filed. Bailey v. Baker Ice Machine Company, U. S. Sup. Ct., Nov. 29, 1915. When the mortgage in question was filed for record no other creditor of the bankrupt had acquired a lien on the mortgaged property by legal or equitable proceedings. It follows that the trustee appointed in the subsequently instituted bankruptcy proceeding did not acquire the status of a creditor holding a lien superior to that of the mortgage. The ruling of the District Court to this effect was correct.

The provision of section 60*b* of the Bankruptcy Act, as amended in 1910 (36 Stat., 842), so far as it has a bearing upon any question presented in this case, is as follows:

"If a bankrupt shall have * * * made a transfer of any of

his property, and if, at the time of the transfer, * * * or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankruptcy be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefitted thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

It seems to us that the language of this provision requires the conclusion that unless a transfer, though it was made by the bankrupt within four months before the filing of the petition in bankruptcy, is one required by law to be recorded or registered, it is not voidable by the trustee unless the bankrupt was insolvent "at the time of the transfer," and the transfer then operated as a preference,
87 and the person receiving it or to be benefitted thereby, or his agent acting therein, then had reasonable cause to believe that the enforcement of such transfer would effect a preference. When a transfer by the bankrupt was made more than four months before the petition in bankruptcy was filed, but was recorded within that period, the statute does not have the effect of making it voidable at the instance of the trustee unless it was one required by law to be recorded or registered and the stated invalidating circumstances existed when it was recorded or registered. In other words, if a transfer, made more than four months before the filing of the petition, was not one required by law to be recorded or registered, the transferee's knowledge, at the time of the recording within the four months' period, of the transferrer's insolvency and that a preference would be effected, does not make the transfer voidable by the trustee. A different conclusion was reached in the case of In re T. H. Bunch Commission Co., 225 Fed. 243. We do not think that the considerations which influenced that conclusion are such as to warrant giving to the statute a meaning different from the one which its words express. The mortgage in question was not a transfer which the Georgia law "required" to be recorded. Before its record it was valid as against the mortgagor, and is subordinate only to other liens created or obtained, or purchases made prior to its actual record. Code of Georgia, 1910, §3260; Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396; In re Jacobson & Perrill, 200 Fed. 812; In re Roberts, 227 Fed. 177. We are not of opinion that the conclusion of the District Court to this effect is opposed to the provision found in amended section 60*b* of the Bankruptcy Act.

The referee's finding that the mortgage was not withheld
88 from record fraudulently or for the purpose of enabling the mortgagor subsequently to obtain credit from others was well supported by the evidence; and this finding was confirmed by the District Judge, who, in the opinion rendered, said:

"So far from there being an agreement or tacit understanding that the mortgage was to be withheld from record to the injury of

subsequent creditors, it was expressly stipulated that no subsequent credit should be obtained."

Notwithstanding the finding of the absence of any fraud in the withholding of the mortgage from the record, it was held that the creditors whose debts were created after the execution of the mortgage and before it was recorded were entitled to prorate in the distribution of the assets on equal terms with the mortgagee. For support of the ruling to this effect reference was made to the decisions in the cases of Clayton v. Exchange Bank, 121 Fed. 630, and In re Jacobson & Perrill, 200 Fed. 812. In each of those cases subsequent creditors were permitted to share in the security of a mortgage made before they became creditors but recorded afterwards because the withholding of the instrument from record was found to have constituted a fraud upon them. The reason which supported those rulings does not exist in the case at bar, where the explicit finding is that there was an absence of any such fraud. There was nothing in the conduct of the mortgagee which should be given the effect of entitling subsequent unsecured creditors to share with the mortgagee in the benefits of the mortgage. In re Roberts, 227 Fed. 177.

From the above stated conclusions it follows that there should be an affirmance except as to the part of the decree which is brought into question by the cross-appeal, and that there should be a reversal as to that part of the decree; and it is so ordered.

89 *Judgment.*

Extract from the Minutes of January 4, 1916.

No. 2816.

W. E. MARTIN, JR., Trustee, et al.
versus
COMMERCIAL NATIONAL BANK OF MACON, GEORGIA.

and

COMMERCIAL NATIONAL BANK OF MACON, GEORGIA,
versus
W. E. MARTIN, JR., Trustee, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby affirmed, except as to the part of the decree which is brought into question by the cross-appeal of the Commercial National Bank of Macon, Ga., and that as to said part of the decree, the same be, and it is hereby, reversed;

It is further ordered, adjudged and decreed that the appellants, W. E. Martin, Jr., Trustee, J. P. Stevens Engraving Company, William Bens Company, Bassett Jewelry Company, Non-Retailing Company, S. Cottel Company, Morris Weil, William Link Company, Frank Smith Company, and Jennings Bros. Manufacturing Company, and the surety on the appeal bond herein, American Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

90 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 84 to 89 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2816, wherein W. E. Martin, Jr., Trustee, et als., are Appellants and Cross-Appellees, and Commercial National Bank of Macon, Georgia, is Appellee and Cross-Appellant, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 83 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 27th day of January, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals.*

91 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2816.

W. E. MARTIN, JR., Trustee, et als., Appellants,
versus
COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellee,

and

COMMERCIAL NATIONAL BANK OF MACON, GEORGIA, Appellant,
versus
W. E. MARTIN, JR., Trustee, et als., Appellees.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript

of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that, on the 20th day of March, A. D. 1916, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"In the Supreme Court of the United States, October Term, 1915.

No. 839.

W. E. MARTIN, JR., Trustee, Petitioner,
versus
THE COMMERCIAL NATIONAL BANK OF MACON, Respondent.

It is hereby stipulated and agreed by and between the petitioner and the respondent in the above stated case, that the
92 certified transcript of record on file in the Office of the Clerk of the Supreme Court of the United States can be taken as a return to the writ of certiorari issued out of the said Supreme Court of the United States on the 8th day of March, 1916, in the above entitled cause.

This March 15, 1916.

(Signed) W. E. MARTIN, JR., *Trustee, Petitioner,*
By W. S. WIMBERLY, *Of Counsel.*
(Signed) THE COMMERCIAL NATIONAL BANK OF MACON, *Respondent,*
By ORVILLE A. PARK, *Of Counsel.*"

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 20th day of March, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.*

93 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which W. E. Martin, Jr., Trustee, et al., are appellants, and Com-

mercial National Bank of Macon, Georgia, is appellee; and Commercial National Bank of Macon, Georgia, is appellant, and W. E. Martin, Jr., Trustee, et al., are appellees, No. 2816, which suit was removed into the said Circuit Court of Appeals by virtue of and appeal and cross-appeal from the District Court of the United States for the Southern District of Georgia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals
94 and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
*Clerk of the Supreme Court of the United States.*

95 [Endorsed:] File No. 25,122. Supreme Court of the United States. No. 839, October Term, 1915. W. E. Martin, Jr., Trustee, etc., vs. Commercial National Bank of Macon, Georgia. Writ of Certiorari. In the United States Circuit Court of Appeals, Fifth Circuit. Filed 20 day of March 1916. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

96 [Endorsed:] 839/25,122. No. 2816. United States Circuit Court of Appeals for the Fifth Circuit. W. E. Martin, Jr., Trustee, et al., Appellant, vs. Commercial National Bank of Macon, Appellee, etc. Writ of Certiorari and Return Thereto.

97 [Endorsed:] File No. 25,122. Supreme Court U. S., October term, 1915. Term No. 839. W. E. Martin, Jr., Trustee, etc., Petitioner, vs. Commercial National Bank of Macon, Ga.. Writ of certiorari and return. Filed March 23, 1916.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

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W. E. MARTIN, JR., TRUSTEE, PETITIONER,
*vs.*
COMMERCIAL NATIONAL BANK, OF MACON,
RESPONDENT.

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable the Supreme Court of the United States:*

The petition of W. E. Martin, Jr., as Trustee, as hereinafter stated, respectfully shows:

## PREFATORY OUTLINE.

J. H. Virgin, a jewelry merchant, gave to the Commercial National Bank a mortgage for $7,500.00 on February 16, 1914, for a present consideration. On the first of August, 1914, the Commercial National Bank was taken over by the American National Bank as liquidating agent. This Bank had the Virgin mortgage recorded on August 20th, and on August 21st, filed a petition in bankruptcy against Virgin alleging that he was insolvent. After the adjudication of Virgin as a bankrupt, the Bank proved this claim as a preferred claim and the Trustee attacked it as a preference. The sole question in the case is whether a mortgage executed for a present consideration and more than four months prior to bankruptcy is, by the Bankruptcy Act, made a preference if not recorded until within this four months' period (and when the bankrupt is insolvent and the mortgagee knows it).

## PROCEEDINGS BEFORE THE REFEREE, IN THE DISTRICT COURT, AND IN THE CIRCUIT COURT OF APPEALS.

The Referee found that the bankrupt was insolvent and that the mortgagee knew it at the time the mortgage was recorded (Record, p. 8, paragraph 6), but held that the Bank's claim was superior to the Trustee's because first in point of time. (Record, pp. 9, 10.)

The District Court held that the mortgage was superior to the Trustee's claim because executed before the four months' period and witheld from record without any fraudulent intent. (Record, p. 63.)

The Circuit Court of Appeals held that the mortgage was superior to the Trustee's claim, because record of the mortgage was not required within the meaning of Section 60-b of the Bankruptcy Act. (Record, p. [illegible].)

Petitioner respectfully submits that this Court should by *writ of certiorari* review the action of the Circuit Court of Appeals in this case in order to compose

## CONFLICTS BETWEEN THE VARIOUS FEDERAL COURTS UPON A QUESTION OF GREAT IMPORTANCE.

The only question involved in petitioner's case is the construction of Section 60-b of the Bankruptcy Act. There are two points at which the different courts are in conflict over the construction of this statute. First, as to the meaning of the clause "if by law recording or registering thereof is required," and second, as to whether this statute makes a mortgage voidable which was given for a present consideration and is then recorded at a subsequent time immediately preceding bankruptcy at a time when the bankrupt is insolvent and when no consideration then passes.

### I.

On the first point before the amendment of 1910 to Section 47-a of the Bankruptcy Act, some of the courts held that where mortgages were good under the State law as against general creditors without record, and record was only required as against lien creditors, that record was, nevertheless, required within the meaning of Section 60-b.

Loeser *vs.* Savings Bank, 148 Fed., 975. (6th C.C.A.)
In re Beckhaus, 177 Fed., 141. (7th C.C.A.)
First National Bank *vs.* Connett, 142 Fed., 33 (8th C.C.A.)

On the other hand the courts of the Fifth Circuit, and some other circuits took the contrary view and held that record under such circumstances was not required.

Meyer Drug Co. *vs.* Pipkin, 136 Fed., 396. (5th C.C.A.)
In re Boyd, 213 Fed., 774. (4th C.C.A.)

Since the amendment of 1910, Section 47-a, investing the Trustee with all the rights of a lien creditor, it has been held generally that record is required as against the Trustee.

Millikin *vs.* Second National Bank, 206 Fed., 14. (4th C.C.A.)
Pacific State Bank *vs.* Coats, 205 Fed., 619. (9th C.C.A.)
In re Bazemore, 189 Fed., 236. (D. C. Ala.)

II.

It has been held that under Section 60-b a mortgage is not a preference if given for a present consideration, no matter under what circumstances the same is recorded.

In re Watson, 201 Fed., 962. (D. C. Ky.)

The exact contrary has been held

In re T. H. Bunch Commission Co., 225 Fed., 243. (D. C. Ark.)

Petitioner submits that the question involved in this case is one of constant recurrence and one of great importance, from both a judicial and mercantile standpoint.

Your petitioner files as an exhibit hereto a certified transcript of the entire record in said cause, including the proceedings in the Circuit Court of Appeals.

Wherefore, your petitioners pray that a *writ of certiorari* may be granted to cause said United States Circuit Court of Appeals for the Fifth Circuit to certify to this court for its review and determination, petitioner's said cause therein entitled "W. E. Martin, Jr., Trustee *vs.* Commercial National Bank of Macon, No. 2816."

W. E. MARTIN, JR., Trustee.

RUDOLPH S. WIMBERLY,
R. DOUGLAS FEAGIN,
OLIVER C. HANCOCK,
*Of Counsel for Petitioner.*

Post Office Address: Macon, Ga.

Georgia, Bibb County:

W. E. Martin, Jr., being duly sworn according to law, deposes and says that the statements contained in the above and foregoing petition subscribed by him are true.

W. E. MARTIN, JR.

Sworn to and subscribed before me this 22nd day of January, 1916.

H. F. RAWLS, *Notary Public Bibb County, Ga.*

## BRIEF FOR PETITIONER.

### I.

Before the amendment of 1910 to Section 47-a of the Bankruptcy Act, there was an irreconcilable conflict between the courts as to when a mortgage was required to be recorded.

The provision of Section 60-b of the Bankruptcy Act, as amended in 1910 (36 Stat. 842), so far as it has a bearing upon any question presented in this case, is as follows:

> If a bankrupt shall have . . . made a transfer of any of his property, and if, at the time of the transfer, . . . . or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the . . . . transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such . . . . transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.

The Georgia Statute is as follows:

> Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained or purchases made prior to the actual record of the mortgage.
>
> Code of 1910, Section 3260.

And see,

> Rhode Island Works *vs.* Empire Co., 91 Ga., 639.
> Southern Iron Co. *vs.* Voyles, 138 Ga., 258 (4).

By the amendment of 1910 to Section 47 of the Bank-

ruptcy Act, the Trustee is "vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings."

The question is, then, under this law does a mortgage now have to be recorded to be valid against the Trustee?

The two sets of authorities are pointed out in the foregoing petition and it was suggested by the court in the case of In re Boyd, *supra*, that this conflict should be settled by the Supreme Court of the United States. It was supposed that this had been rendered unnecessary by the amendment of 1910 to Section 60. However, as appears from the opinion of the Circuit Court of Appeals in this case holding that even now record is not required the conflict persists.

See also

In re Jacobson & Perrill, 200 Fed., 813. (D. C. Ga.)

In which Judge Newman, of the Northern District of Georgia, seems to reach the same conclusion.

II.

In addition to the foregoing conflict there now appears to be a clearly defined difference among the courts as to whether it was the intention of Congress in the enactment in 1910, of Section 60-b to make the recording of a mortgage within the four months' period while the bankrupt was insolvent and the creditor knew it, voidable as a preference when the mortgage was given long before for a present consideration. In other words, if the mortgage is originally given for a present consideration, is it rendered a preference because later recorded under the preferential circumstances enumerated in Section 60-b? The question is answered in the affirmative in the case of

In re T. H. Bunch Commission Co., 225 Fed., 243, 249.

See also

Senate Report No. 691, Sixty-first Congress, Second Session.

Which report is cited as supporting the conclusion reached in the Bunch case.

See also

Remington on Bankruptcy, 3rd Vol., p. 406.

The contrary is held in the case of

In re Watson, 201 Fed., 962.

And this latter case was the one most strongly relied upon by counsel for the Bank in the instant case in the Circuit Court of Appeals.

III.

The Referee, in his opinion in this case, held that under the authority of Anderson *vs.* Chenault, 208 Fed., 405, and In re Jacobson & Perrill, 200 Fed., 813, and Keeble *vs.* John Deere Plow Co., 190 Fed., 1019, the lien of the Trustee did not attach until after the record of the mortgage, and was therefore inferior to the mortgage. In answer to this we submit that under Section 60-b a mortgage violating the law against preferences is thereby rendered inferior to *subsequent* liens, and that this section has no application to liens older in point of time than such a mortgage.

We submit that we have shown that the orders of the various courts in the instant case are erroneous on each of the three grounds on which the same are based, and that we have shown, in addition, a hopeless conflict among the Federal Courts upon a question of the first importance.

Respectfully submitted,

RUDOLPH S. WIMBERLY,
R. DOUGLAS FEAGIN,
OLIVER C. HANCOCK,
*Of Counsel for Petitioner.*
Post Office Address: Macon, Ga.

Received on January 22nd, copy of this petition and brief, and notice that they will be submitted February 7th, 1916. All other service and notice waived.

GEORGE S. JONES,
ORVILLE A. PARK,

*Of Counsel for Commercial National Bank, of Macon, Respondent.*

Post Office Address: Macon, Ga.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1916.

No. 100

W. E. MARTIN, JR., Trustee in Bankruptcy of I. R. VIRGIN, Petitioner,

vs.

COMMERCIAL NATIONAL BANK of Macon, Ga.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

R. DOUGLAS FEAGIN,
RUDOLPH S. WIMBERLY,
OLIVER C. HANCOCK,
Attorneys for Petitioner.

# INDEX


Page of Brief

Amendments of 1910 to the Bankruptcy Act,
Section 60-b ---------- 9
Section 47 (a-2) ---------- 11
Effect of ---------- 9-24
Interpretation by Congress ---------- 23-24
Argument, Brief of ---------- 7-24
Bankruptcy Act, Section 60-b ---------- 9
Section 47 (a-2) ---------- 11
Brief of the Argument ---------- 7-24
Congressional Interpretation of Amendments of 1910 to the Bankruptcy Act ---------- 23-24-25
Consideration, Necessity for and Time of Record of Transfer ---------- 19-24-25
Construction of Bankruptcy Act,
Section 60-b ---------- 9-25
Section 47 (a-2) ---------- 11-18
Of Georgia Recording Statutes ---------- 11
Errors, Specification of ---------- 6
Facts, Statement of ---------- 3-6
Georgia Recording Statute ---------- 5
Lien of Trustee in Bankruptcy ---------- 10-17
Present Consideration Required at Time of Record ---- 19-25
Record, When Required ---------- 9-19
Recording Statute of Georgia ---------- 5
"Required," Meaning of in Section 60-b ---------- 9-19
Senate Report 691, 61st Congress, 2nd Session ---- 21, 23, 24
Specification of Errors ---------- 6
Statement of the Case ---------- 3-6
Transfer, Date of Record as Real Date of Transfer -- 19-25
Trustee as Lien Holder ---------- 10-17

## TABLE OF CASES CITED.


| | Page of Brief |
|---|---|
| Anderson *v.* Chenault, 208 Fed., 400 | 12, 14, 15 |
| Bankruptcy Act, Section 60-a | 9 |
| Beckhaus, In re: 177 Fed., 141 | 10 |
| Boyd, In re: 213 Fed., 774 | 10 |
| Bunch Commission Co., In re: 225 Fed., 243 | 22 |
| Carey *v.* Donohue, 209 Fed., 328 | 10 |
| Carey *v.* Donohue, 240 U. S., 430 | 10, 19 |
| Code of Georgia, Section 3260 | 11 |
| Covington *v.* Brigman, 32 A. B. R., 35 | 16 |
| Davis *v.* Hanover, 210 Fed., 768 | 22 |
| Dean *v.* Davis, U. S. Adv. Ops. 1916, 130 | 20 |
| Deupree, Trustee, *v.* Watson, 32 A. B. R., 407-415 | 21 |
| Dulany *v.* Morse, 39 App. Cas. (D. C.), 523 | 21 |
| First National Bank *v.* Connett, 142 Fed., 33 | 10 |
| Hortogen, In re: 189 Fed., 546 | 17 |
| Jacobson & Perrill, In re: 200 Fed., 812 | 12, 14, 15 |
| Keeble *v.* John Deere Plow Co., 190 Fed., 1019 | 12, 13, 14 |
| Klein, In re: 197 Fed., 241 | 20 |
| Little *v.* Hardware Co., 133 Fed., 874 | 10 |
| Loeser *v.* Savings Bank, 148 Fed., 975 | 10 |
| Mass. Bonding Co. *v.* Kemper, 220 Fed., 847 | 16 |
| Mattley *v.* Geisler, 187 Fed., 970 | 10 |
| Meyer Drug Co. *v.* Pipkin, 136 Fed., 396 | 10, 19 |
| Millikin *v.* Bank, 206 Fed., 14 | 17 |
| Pacific State Bank *v.* Coats, 205 Fed., 619 | 16 |
| Potter Mfg. Co. *v.* Arthur, 220 Fed., 843 | 17 |
| Rhode Island Works *v.* Empire Co., 91 Ga., 639 | 11 |
| Senate Report, 691, 61st Congress, 2nd Session | 21, 23, 24 |
| Shaw *v.* Renfroe, 11 Ga. App., 807 | 11 |
| Southern Iron Co. *v.* Voyles ,138 Ga., 258 | 11 |
| Watson, In re: 201 Fed., 962 | 20, 21 |
| York *v.* Cassell, 201 U. S., 344 | 17 |

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1916.

No. 373.

W. E. MARTIN, JR., Trustee in Bankruptcy of J. H. VIRGIN, Petitioner,

vs.

COMMERCIAL NATIONAL BANK of Macon, Ga.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

# BRIEF FOR PETITIONER.

## STATEMENT OF THE CASE.

The question at issue in this case is the validity of a mortgage given by J. H. Virgin to the Commercial National Bank. This mortgage was given on February 16th, 1914, for a present consideration at a time when the mortgagor was insolvent. The mortgage was not recorded until long after its execution, though there does not appear to have been any express agreement that it should not be recorded. The 1st of August, 1914, the affairs of the Commercial National Bank were taken over by the American National Bank as liquidating agent. The mortgage was recorded by the American

National Bank on August 20th. A day or two before this, Mr. Virgin, the mortgagor, had a talk with the president of the American National Bank, and it appears at this time the bank regarded him as insolvent. After recording the mortgage on August 20th, the American National Bank, using the Commercial National Bank (as a creditor holding another claim not secured by this mortgage) as one of the petitioning creditors, filed an involuntary petition in bankruptcy against Virgin, alleging that he was insolvent.

When this mortgage was filed in the bankruptcy proceedings by the Commercial National Bank as a claim entitled to priority of payment, its allowance as such claim was objected to by the Trustee, and by numerous creditors on the ground that the mortgage was a preference under the bankruptcy law as contained in Sections 60-b and 47 (a-2) of the Bankruptcy Act, the facts being that the mortgage was recorded within the four months period preceding bankruptcy, at a time when the mortgagor was insolvent, and when the mortgagee knew that he was insolvent, and that the recording of the mortgage would effect a preference, and that the transfer arising from the recording of the instrument was non-operative, and that the instrument must be held as not recorded. Record, pages 33-37.

The Referee decided this question against the objectors in favor of the mortgage. He found as a matter of fact that the mortgagor was insolvent, and that the mortgagee knew it, or had reasonable cause to believe it when the mortgage was recorded, but held as a matter of law that as the mortgage was recorded one day prior to bankruptcy that the lien of the mortgage therefore was anterior and superior to that of the Trustee. Record, pages 3-8.

The Trustee and other objectors thereupon filed a petition to review the order of the Referee (see record, pages 37-40) and on the hearing of this the District Court affirmed the

judgment of the Referee in the main. This court held, under the Georgia law contained in Section 3260 of the Code of 1910, which is as follows:

> "Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage."

that the mortgage in this case was good except as to creditors who had extended credit after the giving of the mortgage and before its record. In accordance with this ruling the Court in the main sustained the findings of the Referee but ordered a re-reference to determine what debts were due by the bankrupt for purchases made between the dates of the execution and record of the mortgage. Record, pages 41-44.

To this last provision of the order of the District Court the Bank filed a Cross-Appeal (see Record, pages 51-52), the Trustee and creditors having appealed from the other provisions of the order (see Record, page 46), assigning error on the ground that the mortgage was a preference under the provisions of 60-b and 47 (a-2), and that the transfer arising from the recording of the instrument was non-operative and that the instrument must be held as not recorded. Record, page 49, paragraph 5.

On the trial of these cases in the Circuit Court of Appeals that Court held that the transfer in this case was not required to be recorded under the provisions of the law of Georgia and therefore the transfer was not voidable by the Trustee but was valid and operative, and affirmed the case on appeal and reversed it as to the questions brought up by the cross-appeal. Record, pages 57 to 59.

Thereafter a petition for *certiorari* was filed in this Court by the Trustee and the writ granted.

The question in this case is whether the transfer attacked by the Trustee is invalid and inoperative because recorded at

a time and under circumstances making it invalid and inoperative under the provisions of Section 60-b and 47 (a-2) of the Bankruptcy Act. The Trustee insists that it is invalid and inoperative for this reason and that the Circuit Court of Appeals erred in holding to the contrary.

## SPECIFICATION OF THE ERRORS RELIED UPON.

The errors relied upon in this case are simply that each of the lower courts, as set out in the foregoing statement, held that the mortgage in this case was a valid mortgage and was not invalid and inoperative on account of the provisions of Sections 60-b and 47 (a-2) of the Bankruptcy Act. The point was made by the Trustee and Creditors before the Referee as will appear from their objections, Record, pages 33-37, and the opinion of the Referee, Record, pages 6 and 8. This was carried before the District Court by a petition to review and that Court in its opinion sustained the mortgage against this attack, Record, pages 41-44, and in the specification of errors filed on appeal. This point is made at length in paragraph 5, on page 50 of the Record. The contention of the Trustee at each stage of the case has been that the facts in the case being undisputed and showing that the mortgage was recorded six months after its execution and within less than four months of bankruptcy and at a time when the bankrupt was insolvent and the mortgagee knew it and when there was no consideration passing between the parties, as a matter of law, the mortgage was voidable by the Trustee under the provisions of Sections 60-b and 47 (a-2) of the Bankruptcy Act. This contention was denied by each of the lower Courts and it is these rulings that are relied upon as error in this Court.

## BRIEF.

### I.

*Transfer Voidable Under Section 60-b.*

The mortgage is attacked by the Trustee as being non-operative and invalid under the provisions of Section 60-b of the Bankruptcy Act. In order for the Trustee to sustain this attack it is necessary for him to show that the mortgage was recorded within the four months' period, that the bankrupt or mortgagor was insolvent at this time and that the morgagee knew it, or had reasonable cause to know it, and that the enforcement of the transfer would effect a preference. We do not understand that any of these propositions of fact are disputed, but we nevertheless point out the evidence in the record that sustains them. The Referee finds that the bankrupt was insolvent even when the mortgage was given. See pages 4 and 5 of the Record.

The mortgage was given on February 16th and recorded on August 20th, 1914. (See first paragraph on page 4 of the Record.) The Referee found that at the time of the recording of the mortgage the bankrupt was insolvent, and the bank had reasonable cause to believe that the record and enforcement of the mortgage would effect a preference. Record, page 6, paragraph 6. As these findings of the Referee have never been called in question, it is likewise probably unnecessary to point out the evidence on which they are based, but we also nevertheless do this. The President of the American National Bank testified that in his conversation with Mr. Virgin, just before the record of the mortgage and the filing of the bankruptcy petition, that he did not remember telling Mr. Virgin that he was insolvent, but that he did tell him that he was in such a condition that he could not lend him any

money (Record, pages 25 and 26), and the Trustee testified that Mr. Taylor told him that at the time of the conversation just referred to, he found that Mr. Virgin's condition was such that he could not go on in business. (Record, page 27.) The evidence on which the conclusion of insolvency at this time rests is pointed out by the Referee on pages 4 and 5, of the Record. The involuntary petition was filed by the Commercial National Bank, *et al.*, against Virgin, and sworn to by the Cashier of this Bank on August 21st, one day after the recording of the mortgage. (See page 30 of the Record.) The money secured by the mortgage was obtained by the mortgagor as follows:

$3,000.00 on February 16th, 1914.
$3,000.00 on March 10th, 1914.
$ 500.00 on April 20th, 1914.
$ 500.00 on May 4th, 1914.
$ 500.00 on May 19th, 1914.

(Record, pages 8 and 30), none of which was obtained at the time the mortgage was recorded. These facts bring us to the question of law in the case. We do not understand that opposing counsel dispute the facts as above set forth, but they do take issue with us on the question of law.

The question in this case is whether a mortgage given anterior to the four months' period preceding bankruptcy but recorded within this period and at a time when the bankrupt is insolvent and when the mortgagee has reasonable cause to believe that he is insolvent and that he (the mortgagee) is therefore receiving a preference, is voidable by the Trustee. The proposition of the Trustee is that the recording of the mortgage at this time and under these conditions makes it non-operative and voidable, just as the execution of the mortgage within this period would be, there being no present consideration in either case. The precise question has perhaps not been decided since the amendments of 1910 to the Bank-

ruptcy Act. Nor is any decision necessary. The governing statute, Section 60-b, is perfectly plain. This (leaving out the words immaterial on this point) is as follows:

> If a bankrupt shall have made a transfer of any of his property, and if at the time of the recording of the transfer, and being within four months before the filing of the petition in bankruptcy, the bankrupt be insolvent and the transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, it shall be voidable by the Trustee.

This is the language of the statute so far as material to this point, except that the phrase "if by law recording thereof is required" should immediately follow the reference to the record of the transfer. And this clause is the only one that possibly requires any construction.

## II.

### *Record as Against the Trustee is "Required."*

The question of the necessity of the record of a transfer was first discussed by the courts in considering the meaning of the same words used in the last sentence of Section 60-a, this sentence being added by the amendment of 1903. The decisions on this point are conflicting. Some of the courts held that the word "required" meant "required or permitted," or required for any purpose, and that where it was necessary for an instrument to be recorded in order for it to be good as against all classes of persons (though it might be good as to some without record) it was required to be recorded within the meaning of the law. Others held that the word did not mean the same thing as "required or permitted," particularly in view of the fact that Congress had used the words "required or permitted" in Section 3-b and had apparently purposely left off the word "permitted" in Section 60-a; and that

where a mortgage was good as against general creditors without record, that record thereof was not required within the meaning of the law; and that record thereof was therefore not required as against the Trustee, he being the representative of general creditors and having no lien.

The first of these views was followed by the Sixth Circuit Court of Appeals in

Loeser *v.* Savings Dept. Bank, 148 Fed., 975, 17 A. B. R., 628, 18 L. R. A. (N. S.), 1233.
Carey *v.* Donohue, 209 Fed., 328, 31 A. B. R., 210.

And by the Seventh Circuit Court of Appeals in the case of

In re Beckhaus, 177 Fed., 141, 24 A. B. R., 380.

And by the Eighth Circuit Court of Appeals in the following cases:

First National Bank *v.* Connett, 142 Fed., 33, 15 A. B. R., 662, 5 L. R. A. (N. S.), 148.
Mattley *v.* Geisler, 187 Fed., 970, 26 A. B. R., 116.

While the second view was adopted by the Fourth Circuit Court of Appeals in

In re Boyd, 213 Fed., 774, 32 A. B. R., 548:

And by the Fifth Circuit Court of Appeals in the cases of,

Little *v.* Hardware Co., 133 Fed., 874, 13 A. B. R., 422,
Meyer Drug Co., *v.* Pipkin, 136 Fed., 396, 14 A. B. R., 477.

This conflict among the Courts, however, has been settled by the case of

Carey v. Donohue, 240 U. S., page 430, 60 L. Ed., 726, in which this Court holds that record under Section 60-b is "required," within the meaning of this section, only in those cases where the instrument would be invalid as against the Trustee unless recorded and that the word "required" in this case does not mean required or permitted.

It was decided in the Carey case that record of the deed was not required under the Statute of Ohio where the case arose because that statute required recording only as against a subsequent *bona fide* purchaser, and not as against lien holders of any description. This case very clearly indicates that record would be required of such an instrument where under the law of the local jurisdiction record was required as against a subsequent lien creditor. The law of Georgia *does* require record as against subsequent lien creditors.

> Code of 1910, Section 3260 (quoted above).
> Rhode Island Works *v.* Empire Co., 91 Ga., 639.
> Southern Iron Co. *v.* Voyles, 138 Ga., 258 (4).
> Shaw *v.* Renfroe, 11 Ga. App., 807-808.

It will appear from the foregoing decisions that the decisions of the Firth Circuit Court of Appeals on this point have now been held to be correct by the Supreme Court and a mortgage in Georgia would not have to be recorded to be good as against the Trustee prior to the amendment of 1910 to the Bankruptcy Act as the Trustee then represented only the general creditors and was hence without a lien. To overcome this situation Congress in 1910 amended Section 47 (a-2) of the Bankruptcy Act by adding these words:

> And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.

The Trustee is therefore now a lienholder, a person who has subsequently obtained a lien on the same property as that covered by the mortgage. Therefore record of mortgage as to him, and to be good against him, is required. There can

be no question now, whatever difference of opinion there may have been prior to the amendment of 1910.

Of course, the fact that the Trustee holds a lien does not of itself entitle him to priority when there is another creditor holding an older lien.

The Trustee does not say in this case that his lien is *older* than the bank's and therefore he comes ahead of the bank, but he says that the bank's lien is *invalid and inoperative,* because recorded while the bankrupt was insolvent, etc., *and that being a subsequent lien holder the Trustee is in the proper position to attack the bank's lien.* The bank's lien is invalid only by the positive inhibition of the statute, Section 60-b. It is for this reason invalid just as a transfer made (instead of recorded) within this four months' period is invalid by reason of the inhibition of the Bankruptcy law. In neither case would such a transfer or lien be invalid but for the Bankruptcy law. Both are made such by this law.

In the trial of this case in the lower Courts, counsel for the bank relied upon three cases to support their proposition that this mortgage was not required to be recorded and was not therefore invalid. These cases are:

Keeble *v.* John Deere Plow Co., 190 Fed., 1019.

In re Jacobson & Perrill, 200 Fed., 812, 29 A. B. R., 603.

Anderson v. Chenault, 208 Fed., 400, 31 A. B. R., 349.

None of these cases, however, sustain the validity of the mortgage as against the attack made upon it in this case. The Trustee attacks the mortgage on the ground that it is voidable under Section 60-b of the Bankruptcy Act. In none of these three decisions is Section 60-b cited or construed. This statement is sufficient to show that the point involved in this case is not decided in the cases under discussion. The decision in the Keeble case is as follows:

> The conditional sale was recorded before the petition in bankruptcy was filed, and therefore is prior in time to any lien the Trustee may have growing out of the adjudication in bankruptcy.

This principle of law is not disputed in the instant case, but the principle invoked by the Trustee in this case is that the mortgage was recorded within the four months' period at a time when the bankrupt was insolvent, and is therefore voidable and open to attack from the Trustee and must yield to the lien of the Trustee though his lien is junior in time. This point was not considered in the Keeble case. The opinion of the District Court below in the Keeble case is quoted by Judge Newman in the Jacobson & Perrill case, and it appears from this decision that the question in the Virgin case was not before the Court in the Keeble case, as that Court deals entirely with Section 47 of the Bankruptcy Act and makes no reference whatever to Section 60-b. It does not even appear that the conditional sale in that case was recorded within the four months' period; nor does it appear that the bankrupt was insolvent; nor that the creditor had reasonable cause to believe it at the time of the record of the instrument. The Court says on this point:

> The effect of a failure to register such contracts before the institution of bankruptcy proceedings is not a question involved in this contest.

And the Court could just as well have added that the registration of such contracts within the four months' period was not involved. The whole question discussed on that point is whether or not the lien of the Trustee is older in point of time to that given by the conditional sale involved in the case; the Trustee apparently claiming that the Trustee's lien was one which the Trustee had from the beginning of time, and that the lien of the conditional sale was junior to it.

The same question as that in the Keeble case is under consideration in the Jacobson & Perrill case, and no reference whatever in the whole decision is made to the point in the Virgin case, and in this case the mortgage was apparently actually recorded before the beginning of the four months' period. The Court saying on the lower part of page 814 of the opinion:

> The mortgage was filed for record *some months* before the commencement of the bankruptcy proceedings.

This is at any rate sufficient to show that the four months' period is not under consideration and that the mortgage is not attacked as a preference because recorded within that period.

The point in the Virgin case was sought to be made by counsel in the Chenault case, but it is not decided by the Court in any stage of the proceedings. It will be seen from the 31 A. B. R., page 351, that the Referee in his findings in the Chenault case found that the mortgage was not given to hinder, delay or defraud creditors, and further, that the lien against the Trustee by Section 47 (a-2) is junior in point of time to the lien of the Chenault mortgage recorded before bankruptcy, the latter being the same point as that in the Keeble and Jacobson & Perrill cases. There is no reference in the decision by the Referee to Section 60-b, nor to the point involved in the Virgin case. The opinion of the District Court in the Chenault case is found reported in 204 Fed., 129, and the District Court decides that a crop mortgage is superior to the rights of the holder of a note against the bankrupt which was not reduced to judgment before bankruptcy. The Circuit Court of Appeals decided that the Chenault mortgage was given for a valid consideration and not to hinder, delay or defraud creditors; that it was not withheld from record with any fraudulent intent or to bolster the credit of

the mortgagor, and that it was recorded before any lien or claim of the Trustee in bankruptcy did or could attach—this last being the same question as that in the Keeble and Jacobson & Perrill cases. It will be seen that in this opinion there was no reference whatever to Section 60-b, or to the point involved in this case. Counsel insist, however, that the point was made in the Chenault case, and as the decision was against the Trustee it is therefore a decision against him on this point. Not so. In order for the point made by the Trustee to be good it was necessary to show that Beard was insolvent when the mortgage was recorded, and that Chenault knew it or had reasonable cause to believe it and that its record would effect a preference. The evidence is not given in the opinion, but the following extract is taken from page 6 of the record in the Circuit Court of Appeals. Chenault testified:

> I considered Mr. Beard solvent at the time I took the mortgage, I considered him solvent when I had it recorded. I did not know that Mr. Beard had any other creditors on earth.

And it is a much more reasonable conclusion to think that the Circuit Court of Appeals decided this point, if they decided it at all, on a contested issue of fact than that they decided it on the law point involved when the law point, if it was sustained by the evidence, would demand a contrary decision; and when no reference whatever is made to the law point in the decision of the Court.

We, therefore say, as we stated in the beginning, that none of the authorities cited by counsel sustain the validity of the mortgage against the attack now made by the Trustee in this case. He has cited none and can cite none. There are none.

On the other hand there have been a number of decisions besides the Carey case which strongly support the position of the Trustee in this case. One of the nearest in point is that of

*Covington v. Brigman*, 32 *A. B. R.*, 35, *from the District Court for the Eastern District of North Carolina.* The Court decided in this case that a chattel mortgage is required to be recorded under the statute of North Carolina within the meaning of Section 60-b, of the Bankruptcy Act. The North Carolina statute is not given in the opinion. But we suggest that it is immaterial as the statutes of all of the States are substantially the same so far as this point is involved, for the reason that practically all of them require the record of a mortgage to make it good against lien creditors, and the Trustee is now a lien creditor. We call attention to the fact that this opinion is rendered in a circuit which held that record was not required under the language of Section 60-a before the amendment of 1910. In the course of the opinion the Court says:

> There would seem to be but little room for construction of this language (language referred to being that of Section 60-b), it is quite clear, especially in the light of the judicial construction of the language used in the statute prior to the adoption of the amendments and the evident purpose of Congress in making them.

In the case of

Pac. State Bank *v.* Coats, 205 Fed., 619 (6),

the Ninth Circuit Court of Appeals comes pretty close to the question when it decides that since the Trustee is made a lien creditor by Section 47 (a-2) of the Bankruptcy Act, a chattel mortgage recorded as a real estate mortgage was void against the Trustee because not properly recorded. This is substantially a holding that record is required within the meaning of the language used in Section 60-b, and this language, we understand, is the only point about which there is any doubt.

In the course of the opinion, the Court says:

> It is the purpose of this amendment to vest in the

Trustee for the interest of all creditors the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The Trustee no longer stands in the shoes merely of the bankrupt with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings. "The class of cases unprovided for by the original act and intended to be reached by the amendment," says Mr. Collier in his work on Bankruptcy (9th Ed.), page 659, "was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the Trustee for the interest of all creditors potential rights of creditors with such liens. This provision of the Bankruptcy Act," says Witner J., In re Hortogen (D. C.), 189 Fed., 546, 549, "puts the Trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor," distinguishing the York *v.* Cassell case, 201 U. S., 344, 50 L. Ed., 782. Mr. Collier is further of the view that, "The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the registration laws of the States. Collier, 660."

And see also to the same effect:

Potter Mfg. Co. *v.* Arthur, 220 Fed., 843 (2).
Mass. Bonding Co. *v.* Kemper, 220 Fed., 847.

The Circuit Court of Appeals for the Fourth Circuit in the case of

Millikin *v.* Second National Bank of Baltimore, 206 Fed., 14, 30 A. B. R., 477 holds,

That record of a chattel mortgage was required as against the Trustee in bankruptcy.

In fact it is conceded by counsel for the mortgagee that record of this mortgage before bankruptcy was necessary in

order to escape the consequences of the lien given the Trustee by Section 47 (a-2); and this concession is all that is necessary as to the meaning of the word "required," in Section 60-b. So far as Section 47 (a-2) alone is concerned, or 47 (a-2) in connection with 67-a, it is sufficient if the mortgage is recorded one day before bankruptcy, but if there be added to the law laid down in Sections 47- (a-2) and 67-a, the facts that at the date of the record the bankrupt is insolvent and the mortgagee has reason to believe it, the mortgage is voidable if recorded within the four months' period, by virtue of 60-b, and to escape the consequences of this section it is necessary that either the mortgage be recorded prior to this four months' period or that the bankrupt be solvent, or at least the mortgagee have no reason to believe that he is insolvent at the time of the record.

The record of an instrument is required as to any particular person if the instrument must be recorded to be good against him. If the subsequent lienor is entitled to priority unless the antecedent mortgage is recorded, such mortgage is required to be recorded as to him. The Trustee is a subsequent lienor. Unless the mortgage is recorded he, the Trustee, is entitled to priority. It is therefore "required" to be recorded as to him. This is all the word means. The fact that he is the holder of a junior lien is the very fact that gives him the right to attack the mortgage as voidable under this section.. In some jurisdictions such a mortgage can be attacked by no one except junior lienors; and there would be no necessity for providing that a mortgage if unrecorded should be invalid so far as the older liens were concerned. Section 60-b gives the Trustee the right to show that the lien is invalid as to the younger lien because the older lien operates as a preference obtained when the bankrupt was insolvent and when the creditor had reasonable cause to believe that he was insolvent.

In his opinion, in the instant case, the Judge of the District Court cites the Meyer Bros case, *supra,* to sustain his judgment in this case. The Meyer Bros. case was decided before the Amendments of 1910, and we have undertaken to show that these Amendments were enacted, for the express purpose of changing the law as laid down in the Meyer Bros. case, and that they accomplished this purpose as plainly and directly as it was possible for Congress to do by the use of the English language.

Neither is it necessary that any preference should have been intended, and the fact that the Court in its opinion holds that no preference was intended is beside the question. Under the original Bankruptcy Act, it was necessary that a preference should be intended, but under the law as it now stands, the rule is that the transfer operate as a preference.

The construction we have placed upon this statute in the light of the foregoing decisions is made practically certain by the decision of this Court in the case of Carey *v.* Donohue, cited above, in which the Court decided that the mortgage in that case was not required to be recorded because the Ohio statute required record only as against subsequent purchasers and not as against subsequent lien holders, and the Trustee was a subsequent lien holder and not a subsequent purchaser. In this case the mortgage is required to be recorded as against a subsequent lien holder and the Trustee being a subsequent lien holder it follows that record is required as to him.

## III.

### *Date of Record is Time of Transfer and There Must Be Consideration at This Time.*

The bank contends in this case that not only is record not required of its mortgage within the meaning of section 60-b, but that the mortgage cannot be attacked because it was given for a present consideration and counsel say that for this rea-

son it cannot be a preference because a preference presupposes a pre-existing debt. The statute as amended does not name a transfer of this character as a preference but provides that such a transfer shall be invalid when it shall operate as or effect a preference. We think the answer to this contention is that *the transfer is clearly made under the present law at the time it is recorded,* where there is delay in recording, rather than at the time of its execution, *and at the time of recording the mortgage in this case the bank was a creditor.*

To sustain this contention counsel for the bank relied in the lower Court on two cases:

In re: Klein, 197 Fed., 241, and
In re: Watson, 201 Fed., 962,

and we take it that in this Court they will add to their authorities the case of

Dean *v.* Davis, decided by this Court on January 8th, 1917, and reported in U. S. Advance Opinions, 1916, page 130.

The Klein case does not support their contention but supports ours. While it was decided after 1910 it was decided in a case which arose prior to 1910 and was construing the law as it stood under the Amendment of 1903. The Court holds at the top of page 251 of the opinion that the Amendment of 1910 makes a preferential transfer, when recordable and recorded, speak as of the date of the recording. In the case of Dean *v.* Davis, supra, the mortgage was given on one day and recorded on the next day so that its execution and recording was practically contemporaneous with the passing of the consideration for which it was given and it could not be said in this case that at the time of the recording of the mortgage there was any pre-existing debt. In the case at bar the mortgage was executed February 16th, 1914, and recorded August 20th, 1914, and while the bank was not a creditor *as to this debt* before the execution of the mortgage

on February 16th, 1914, *it was such a creditor when the mortgage was recorded and had been for six months.* The recording of this mortgage while the bankrupt was insolvent and with his foot in the bankruptcy court operated as a preference therefore or effected a preference as far as the bank's mortgage debt was *then* concerned.

The Watson case, *supra,* does support the position of the respondent. It is a District Court decision, the only decision which does support this position, and is opposed by the letter of the statute, the interpretation placed upon it by Congress, and the great weight of authority.

It is not supported by the opinion of the Circuit Court of Appeals for the Sixth Circuit to which the Watson case, *supra,* was appealed from the District Court:

> See Deupree, Trustee, *v.* Watson, 32 A. B. R., 407-415.

The Circuit Court of Appeals upheld the validity of the Watson mortgage, not by the reasoning of the District Judge, but because the mortgage was executed February 16th, 1909, before the amendments of 1910 to the Bankruptcy Act were passed, and was therefore governed and controlled by the bankruptcy amendment of 1903, and not by the amendments of 1910 since those amendments could not have any retroactive effect.

> See bottom of page 413 and page 414 of opinion Deupree, Trustee, *v.* Watson, *supra.*

Under the language of Section 60-b it is provided that if a bankrupt shall have made a transfer of any of his property and if at the time of the recording of the transfer the bankrupt be insolvent and the transfer *then operate as a preference,* etc., it shall be voidable by the Trustee:

> See also Senate Report, 691, 61st Congress, 2nd session, in which it is pointed out that the purpose of this

amendment was to prevent the taking of secret liens and afterwards recording them just before bankruptcy.

The Senate, and the House which concurred in this report, both placed the interpretation upon the statute which they were enacting as making the date of recording (where there was delay in recording) the time as to which the question of consideration or non-consideration and present consideration or past consideration and solvency or insolvency, etc., were to be determined. The precise question was decided by the Eighth Circuit Court of Appeals in the case of

> In re: Bunch Commission Company, 225 Fed., 243-249, in which the Court cites the Senate Report above referred to as illustrating the correctness of its decision.

See also

> In re: Dulany *v.* Morse, 39 App. Cas. (D. C.), 523.

And also

> In re: Davis *v.* Hanover, 210 Fed., 768 (3), 31 A. B. R., 368 (4th C. C. A.),

where the Court says (on page 368):

> Under Section 60-a of the Bankruptcy Act, as amended in 1903, but prior to the amendment of 1910, a transfer should be judged in determining whether or not it constitutes a preference as of the time when it was made and not at the time of its registration.

and (on page 375):

> The amendment of 1910 makes a radical change in the law in this respect.

And Remington in the third volume of his work on bankruptcy (on page 406) says:

> The amendment of 1910 makes the date of the recording, where recording is required under the State law, the date at which the creditor is to prove the exist-

ence of all the elements of a preference—truly the right date, for, as above noted, it is the present insolvent fund with which creditors are concerned, not the debtor's estate in the condition which might have existed several years beforehand.

In cases of preferences effected by instruments required to be recorded but which are not recorded at all, the date of the effective "transfer" becomes immaterial as to property in the custody of the Bankruptcy Court, since, as to such property, the Amendment of 1910 to Bankruptcy Act, Section 47 (a-2), gives the Trustee the right of a levying creditor, whereby such lien is avoided without proof of its being a preference. However, preferences effected by instruments requiring to be recorded but which are not recorded at all, where the property is concerned does not come into the custody of the Bankruptcy Court, must still be proved to have been preferences at the date of the transfer between the parties, except where the State law does not require actual seizure of the property but is satisfied with the existence merely of a creditor holding an execution returned unsatisfied; in which latter event the unrecorded lien may be voided by operation of Bankruptcy Act, Section 47 (a-2) as amended in 1910.

Perhaps the clearest construction of the amendment of 1910 to the Bankruptcy Act in relation to preferential transfers as showing that the real date of the transfer is the date of record and that the question of consideration is to be determined as of this date is that placed upon this amendment by Congress itself at the time the law was enacted and embodied in the Senate report 691, *supra,* which report concurred in the report of the House Judiciary Committee; and the Senate and House in interpreting this Act both used the following language:

"The real trouble it seems, is this: There are, in reality, two times of 'transfer' in such cases; as between the transferrer and the transferee, obviously, the time of

transfer is the time of the original execution and delivery of the instrument to the grantee or transferee, regardless of its registration, but as to other creditors and the rest of the outer world, the 'transfer' is, by statute, not a complete 'transfer' at all until recording, until delivery to the public recorder—then, and not until then, the debtor signifying to outside parties, to all others who might become interested in his assets, the effectual separation of the liened property from the rest of his assets. This, it must be conceded, is the bottom principle upon which rest the recording statutes of all our States. It is also the bottom principle of the right to legislate against secret liens. Thus, in our bankruptcy preference statute, the great object likewise should be to make clear that the 'transfer,' so far as outside parties becoming interested in the estate are concerned, *is not complete or, perhaps, is not even to be considered a 'transfer' at all (in cases where State law requires recording as against creditors), until delivery of the instrument to the recorder for registration.*

"Creditors, then, by these State Supreme Court decisions, construing the preference provisions of the present bankruptcy act, must be able to prove that at the time of the 'transfer,' perhaps several years beforehand, the debtor was then insolvent, the debt was then a past, a pre-existing, debt, etc.,—a practical impossibility; indeed, an unreasonable requirement, since it is the present insolvent fund of the debtor that is rightly involved, and not some ancient fund existing years beforehand.

*"This proposed amendment squarely and clearly makes the date of the recording (where recording is required under State law to make a lien valid as against levying creditors), the date at which the creditor is to prove the existence of all the elements of a preference*—truly the right date, for, as above noted, it is the present insolvent fund with which creditors are concerned, not the debtor's estate in the condition which might have existed two or three years beforehand." (The italics are ours.)

We think that we have shown that this case comes squarely within the inhibiting provision of Section 60-b, *that at the time of its record this mortgage operated as a preference in payment or securement of a then pre-existing debt; that the mortgage was one required to be recorded as against the lien holding Trustee; and that it is therefore voidable by the Trustee.*

Respectfully submitted,

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[redacted]

# INDEX


PAGE

The Question ..... 1

The Pertinent Facts ..... 1

The Issues Raised

Where unrecorded mortgage inferior only to subsequent lienors and purchasers, is it "required" to be recorded? ..... 2

Is mortgage for present consideration preferential when recorded within four months' period? ..... 2

Mortgages Not Required to be Recorded in Georgia ..... 3

Carey *v.* Donohue ..... 5

Prior decisions ..... 5

Constructions of Carey *v.* Donohue ..... 6- 9

Effect of Amendment of 1910 Giving Trustee Status of Lien Creditor ..... 9

Construction of amendment in Bailey *v.* Baker Ice Machine Co. 10

Mortgage for Present Consideration not Preferential ..... 11

Effect of Amendment of 1903 to § 60 Bankruptcy Act ..... 12

Constructions of amendment ..... 13,14

Effect of Amendment of 1910 to § 60b, Bankruptcy Act ..... 15

The amendment ..... 15

Subsection *a* not changed ..... 15

Time within which transfer to be attacked not changed ..... 16

Changed only rules of evidence ..... 17

Construction of amendment ..... 17-19

Bailey *v.* Baker Ice Machine Co. ..... 19

Georgia statute and decisions as to recording conditional sales contracts ..... 21

# CASES CITED


| | PAGE |
|---|---|
| Bailey *v.* Baker Ice Machine Co., 239 U. S. 268 | 10, 19 |
| Big Four Imp. Co. *v.* Wright, 207 Fed. 535 | 14 |
| Bunch *v.* Maloney, 233 Fed. 967 | 7 |
| Carey *v.* Donohue, 240 U. S. 430 | 5 |
| Caslon Press, In re, 229 Fed. 133 | 19 |
| Continental, etc. Bank v. Chicago Tile, etc. Co., 229 U. S. 435 | 12 |
| Cottrell *v.* Merchants Bank, 89 Ga., 508 | 21 |
| Dean *v.* Davis, U. S. Adv. Ops. 1916, 130 | 12 |
| Doody *v.* Adams, 123 Fed. 1007 | 4 |
| Deupree *v.* Watson, 216 Fed. 483 | 13, 18 |
| Dudley *v.* Easton, 104 U. S. 99 | 6 |
| Emerson-Brantingham Imp. Co. *v.* Lawson, 237 Fed. 877 | 9 |
| Ernst *v.* M. & M. Natl. Bank, 201 Fed. 664 | 12 |
| Hawes *v.* Glover, 126 Ga. 305 | 3 |
| Holt *v.* Crucible Steel Co., 224 U. S. 262 | 8 |
| Jackson Brick & Tile Co., In re, 189 Fed. 636 | 14 |
| Johnson *v.* Barrett, 237 Fed. 112 | 8 |
| Klein, In re, 197 Fed. 241 | 14 |
| Martin *v.* Commercial Natl Bank, 228 Fed. 651 | 4 |
| Meyer Bros. Drug Co. *v.* Pipkin Drug Co., 136 Fed. 396 | 5 |
| Rhode Island Locomotive Works *v.* Empire Lumber Co., 91 Ga. 639 | 21 |
| Sturtevant, In re, 188 Fed. 196 | 14, 18 |
| Watson, In re, 201 Fed. 962 | 13, 18 |
| Williams, In re, 120 Fed. 542 | 4 |
| Wright, In re, 96 Fed. 187, 189 | 4 |


# STATUTES CITED


| | |
|---|---|
| Park's Ann. Code, § 3260 | 3, 4 |
| Park's Ann. Code, § 3319 | 20 |
| Bankruptcy Act, § 47 | 10 |
| Bankruptcy Act, § 47a | 9, 20, 21 |
| Bankruptcy Act, § 47a(2) | 11 |
| Bankruptcy Act, § 70a | 10 |
| Bankruptcy Act, § 60 | 9 |
| Bankruptcy Act, § 60a | 9, 11, 12, 17, 18 |
| Bankruptcy Act, § 60b | 9, 15, 17, 18 |
| Bankruptcy Act, § 70a | 10 |
| Collier on Bankruptcy (10th Ed.), p. 996 | 10 |

# In the Supreme Court of the United States

OCTOBER TERM, 1916.

## No. 373

W. E. MARTIN, Trustee in Bankruptcy of
J. H. VIRGIN, Petitioner,

*v.*

COMMERCIAL NATIONAL BANK
of Macon, Georgia, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

## BRIEF FOR RESPONDENT.

### THE QUESTION.

*Quoting from the petition for certiorari, "the sole question in the case is whether a mortgage executed for a present consideration and more than four months prior to bankruptcy is by the Bankruptcy Act made a preference if not recorded until within this four months' period and when the bankrupt is insolvent and the mortgagee knows it."*

### THE PERTINENT FACTS.

The facts are not in dispute. They are found by the Referee, his findings approved by the District Court, and the

judgment of the District Court affirmed by the Circuit Court of Appeals. A detailed statement on the part of respondent appears unnecessary. So far as pertinent to the present inquiry, the facts are:

(a): That the mortgage in question was given for a present consideration, $3,000.00 having been advanced at the date of its execution and $4,500.00 at various times thereafter, the mortgage expressly covering future advances up to $7,500.

(b): At the time the mortgage was given, both the mortgagor (the bankrupt) and the bank believed that he was solvent (and he probably was), and there was no purpose or intent on the part of either to effect a preference.

(c): The mortgage was given more than four months prior to bankruptcy, and was actually recorded before the petition for adjudication was filed, though within the four months' period.

(d): While the mortgage was attacked in the Court below as having been given to hinder, delay and defraud creditors, it was held to be valid, and no attack is now made upon this ground.

## THE ISSUES RAISED.

The question as stated in the petition for *certiorari* is really two questions:

First: Where under a State statute an unrecorded mortgage is valid as to the mortgagor and his general creditors, but is postponed to liens created or obtained and purchases made prior to its record, is such mortgage "required" to be recorded within the meaning of Section 60 of the Bankruptcy Act?

Second: Does a mortgage given for a present consideration, and not otherwise preferential, become a preference under Section 60 of the Bankruptcy Act when recorded within the four months' period, its record not being required by the State statute, save as to subsequent lienors and purchasers?

## BRIEF OF THE ARGUMENT.

### I.

**Under the law of Georgia, mortgages are not required to be recorded. If not recorded they are postponed to subsequent lienors and purchasers only.**

The statutory provision is:

> "Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained or purchases made prior to the actual record of the mortgage."
>
> Park's Ann. Code, § 3260 (Code 1910, same section).

Construing this section, the Supreme Court of Georgia, in a recent case, said:

> "A mortgage is perfectly valid as between the parties thereto though never recorded. Hardaway *v.* Semmes, 24 Ga. 305; Gardiner *v.* Moore, 51 Ga. 268; Myers *v.* Piquet, 61 Ga. 260; Civil Code, § 2727 (Park's Ann. Code, § 3260). If it is not recorded, or as in this case, is illegally recorded, the only effect is to postpone it to purchases made or liens procured by contract without notice of its existence, or to liens obtained by operation of law."
>
> Hawes *v.* Glover, 126 Ga. 305, 317, 55 S. E. 62.

The United States Courts have frequently been called upon to construe and apply this section of the Georgia Code. Said Judge Speer, of the Southern District of Georgia:

> "Repeated decisions of the Supreme Court of this State have declared that the failure to record such a mortgage (mortgage on a stock of merchandise) does not impair its validity."

In re Williams, 120 Fed. 542; affirmed, sub nomine, Doody *v.* Adams (5 C. C. A.), 123 Fed. 1007.

Said Judge Newman, of the Northern District of Georgia:

> "In Georgia the only necessity for recording a mortgage is to make it good as against intervening liens or conveyances. It is always good as against the mortgagor, and is also good as against the general creditors of the mortgagor without a lien. A claim based on a mortgage, therefore, will always be a valid lien against the general creditors of the estate who have not obtained a lien, notwithstanding the failure to record the mortgage."

In re Wright, 96 Fed. 187, 189.

And the Circuit Court of Appeals in its opinion in the instant case (Tr. p. 58), say:

> "The mortgage in question was not a transfer which the Georgia law 'required' to be recorded. Before its record it was valid as against the mortgagor, and is subordinate only to other liens created or obtained or purchases made prior to its actual record. Code of Georgia, 1910, § 3260."

Martin *v.* Commercial National Bank (5 C. C. A.), 228 Fed. 651.

It is to be noted that the Georgia statute itself declares that the mortgage remains valid though unrecorded, and is only '*postponed* to liens created or obtained or purchases made prior to its record.' It differs from the recording statutes of a number of States, which declare the mortgage void as to creditors and purchasers. These statutes have generally been construed to limit the word "creditors" to subsequent lien creditors, and thus to make the statute mean substantially the same as the Georgia statute. But we think the distinction is important, especially in view of the construction placed upon the Bank-

ruptcy Act by some of the Courts of Appeal. Under the language of the Georgia statute, clearly a mortgage is not "required" to be recorded. It is simply postponed as to subsequent lienors and purchasers.

## II.

### Carey v. Donohue, 240 U. S. 430.

It would serve no good purpose to discuss the decisions of the Federal Courts prior to the authoritative utterance of this Court in the case cited. The decision by Mr. Justice Hughes points out the conflict. It appears that the Circuit Courts of Appeal were about equally divided in their construction of the clause in Section 60, "if by law recording or registering is required." We think the weight of authority was in favor of the construction adopted by the Fifth Circuit Court of Appeals, which held that a mortgage is not required to be recorded where the State law requires record only as against lien creditors and subsequent purchasers.

> Meyer Bros. Drug Company *v.* Pipkin Drug Company (5 C. C. A.), 136 Fed. 396.

But be that as it may, this Court in Carey *v.* Donohue disagrees with those Courts which hold that the word "required" "refers to the character of the instrument giving the preference without regard to the persons in whose favor the requirement is imposed," and that "required" is equivalent to "required or permitted." The statute of Ohio under consideration by the Court required the recording of conveyances only as to subsequent purchasers. It was held that such purchasers, not being within the purview of the Bankruptcy Act or interested in the estate of the bankrupt, were not represented by the Trustee, and, therefore, that a requirement for recording as to such purchasers did not make the conveyance one which

was "required" to be recorded under Section 60. While it is true that the Court did not in terms hold that a mortgage, good as against general creditors and requiring record only as to subsequent lienors, is not one which is "required" to be recorded, this not being necessary for the decision of the case then under review, the argument advanced is, we think, clearly in favor of this construction.

The trustee in bankruptcy represents general or unsecured creditors. His duties relate chiefly to their interests. He is not in any true sense the representative of secured or lien creditors. Their liens are not affected by the bankruptcy. They are not required to intervene therein or to prove their claims. The Trustee has nothing to do with them, unless the value of the property is greater than the encumbrance.

Dudley *v.* Easton, 104 U. S. 99.

These lienors are hardly more within the purview of the Bankruptcy Act than are subsequent purchasers.

> "The requirement for registry or record is established for the protection of creditors,—the persons interested in the bankrupt estate and in whose behalf or in whose place the Trustee is entitled to act."

This is the language of this Court in the Carey case. Are lien creditors such persons? Are they interested in the bankrupt's estate? Is the Trustee entitled to act in their behalf or in their place? If not, then the Carey case settles the question in favor of respondent.

The construction which we place on Carey *v.* Donohue is that given to it by the Circuit Court of Appeals for the Eighth Circuit, which Court prior to the decision had held that where a statute required a mortgage to be recorded against subsequent purchasers only, it was "required" to be recorded within the meaning of Section 60.

Said that Court, speaking through Hook, Circuit Judge:

"Two views may be taken of the construction given by Carey v. Donohue to the recording requirement clause of Section 60b; First, that it is for the benefit of creditors generally, because their rights are the concern of bankruptcy proceedings, but does not embrace those cases in which the requirement is in the interest of persons outside the purview of the Bankruptcy Act. Second, that as to the creditors themselves the clause picks up and adopts all the substantive and procedural limitations of the construction of the statute prescribing the requirement; and if in local practice creditors of a particular class, like general creditors, could not invoke the failure to record, a corresponding disability rests upon the trustee in bankruptcy. The difference between these views is of much importance in the administration of the Bankruptcy Act. The Connett case, *supra* (142 Fed. 33), and Mattley v. Giesler, 110 C. C. A. 90, 187 Fed. 970, in this Court, were cited by the Supreme Court. Each involved a controversy between a chattel mortgagee, who had delayed recording his mortgage, and creditors, for whom a trustee in bankruptcy stood. Were it not for the apparent disapproval of the doctrine of those cases, it would be quite clear that the first and broader construction above mentioned is the correct one."

Bunch v. Maloney (8 C. C. A.), 233 Fed. 967.*

In order to obviate the effect of the decision in Carey v Donohue and the "apparent disapproval of the doctrine" which had been established by several cases decided by that Court, it was held that where a State statute provided that "every mortgage shall be a lien on the mortgaged property from the time the same is filed for record and not before," that it was "required" to be recorded within the meaning of the Bankruptcy Act, notwithstanding a construction by the Supreme Court of the State to the effect that an unrecorded mortgage was good between the parties and against general

*This case is now pending in this Court on writ of certiorari. U. S. Adv. Opinions, 1916, p. 13.

creditors. The Court holds that this construction made a "procedural distinction" between creditors which would not be followed by the Federal Court. It will be readily seen that there is a wide distinction between the statute of Arkansas then under consideration and the recording statute of Georgia. We are not dependent on a construction by the Georgia Courts based on a "procedural difference" between lien and general creditors. The statute itself declares a mortgage valid though unrecorded, but postpones it as to lien holders and purchasers only; and as said by this Court:

> "The effect to be given in bankruptcy proceedings to an unrecorded chattel mortgage as against subsequent creditors of the bankrupt mortgagor, without notice, must be determined by the recording law of the State."
>
> Holt v. Crucible Steel Co., 224 U. S. 262.

The view here expressed of the decision in Carey v. Donohue is that of the distinguished Judge of the Northern District of Georgia, Judge Newman, who in a recent case, citing that decision as authority, held:

> "A State statute requiring conveyances of real estate to be recorded to render them valid against subsequent purchasers or incumbrancers in good faith without notice, but under which they are valid without recording as against general creditors of the grantor, is not a law requiring them to be recorded, within the meaning of Bankr. Act 1898, Sec. 60a, as amended by Act Feb. 5, 1903, c. 487, Sec. 13, 32 Stat. 799 (Comp. St. 1913, Sec. 9644), and for the purposes of the act a conveyance in such State is effective from its date."
>
> Johnson v. Barrett, 237 Fed. 112.

A similar construction has been placed on the Carey case by Judge Wade, of the Southern District of Iowa, who on the authority of this decision and of Bailey v. Baker Ice Machine

Co., declined to follow previous decisions of the Court of Appeals for the Eighth Circuit.

> Emerson-Brantingham Imp. Co. *v.* Lawson, 237 Fed. 877.

It will be noted that none of the cases cited by petitioner in support of the petition or in his brief were decided since Carey *v.* Donohue.

III.

**Section 47a, as amended in 1910, giving the Trustee the status of a lien creditor, has no bearing on the question of preference.**

Section 47 deals exclusively with the duties of trustees. It has no reference whatever to preferences, which are dealt with in Section 60. Sub-section 2 of Section 47a prescribes as one of the duties of trustees to "collect and reduce to money the property of the estates for which they are trustees." Congress by the Act of June 25th, 1910, amended this section by adding that Trustees "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon," etc. It is said that the purpose of the amendment was to strike down secret liens. This doubtless is true. But it has nothing to do with *preferences* as the term is used in the law of bankruptcy.

The purposes of Section 60a and b and Section 47a are totally different. Under Section 60 a mortgage does not have to be recorded at all unless record is required by the law of the State. Section 47 has nothing to do with preferences, but is intended solely to clothe the Trustee with the rights of a lien creditor, the lien taking effect as of the date of the bankruptcy. A recorded mortgage in Georgia is superior to judgments or

other liens. Under the Bankruptcy Act the Trustee takes the property of the bankrupt subject to all valid liens thereon.

> Bankruptcy Act, § 70a.
> Collier on Bankruptcy (10th Ed.), p. 996.

When the Trustee qualified and his lien became operative, the property of the bankrupt was already subject to the valid and duly recorded lien of the Bank, and, therefore, the Trustee took subject to that lien. Under Section 47 the contest is between lien creditors and the rule is *prior tempore, potior jure*.

Whatever doubt may have existed as to this, if any, was set at rest by the decision of this Court in

> Bailey v. Baker Ice Machine Co., 239 U S. 268.

Said Mr. Justice VanDevanter, for the unanimous Court, in that case:

> "Had it been intended that the trustee should take the status of a creditor holding a lien by legal or equitable process as of a time anterior to the initiation of the bankruptcy proceedings, it seems reasonable to believe that some expression of that intention would have been embodied in Sec. 47a as amended. As this was not done, we think the better view, and one which accords with other provisions of the act, is that the trustee takes the status of such a creditor as of the time when the petition in bankruptcy is filed."

In the Bailey case a contract of conditional sale was attacked as a preference because recorded some months after its execution, and within four months of bankruptcy, at a time when the maker was insolvent. The recording statute of Kansas then invoked declared an unrecorded conditional sale valid between the parties, but void as against a creditor who fastens a lien upon the property by execution, attachment, or like legal process. The question was therefore squarely

made that the trustee's lien under 47a(2) gave him a right to attack the "transfer" and, therefore, recording as to him was "required." The position of the trustee in that case was precisely that of the petitioner herein. The conclusion reached by the Court in that case would seem to be decisive of the present question.

## IV.

### A mortgage executed in good faith for a present consideration is not a preference within the meaning of the Bankruptcy Act.

Coming now to the second question, we insist that a mortgage given for a present consideration is not a preference and is not made a preference by recording within four months of bankruptcy.

Preferences are defined by Section 60a, while Section 60b specifies the circumstances under which preferences may be avoided by the Trustee.

Section 60a as originally enacted declared:

> "A person shall be deemed to have given a preference if, being insolvent, he has * * made a transfer of any of his property, and the effect of the * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The use of the words "creditor," "debt," and "creditors of the same class," indicates clearly that the intention of the Section was to provide against transfers for the purpose of paying or securing *a then existing creditor*, not transfers to a purchaser or other transferee for value at the time the transfer is made. A purchaser or a lender taking security at the time the loan is made is not a "creditor." He has no "debt" to secure. He does not obtain a greater percentage of his "debt" than

any other of such "creditors of the same class." The bankrupt's property is not diminished by the transfer or the giving of the security. His estate is nowise lessened.

As said by this Court in a recent decision:

> "Preference implies paying or securing a pre-existing debt of the person preferred."
>
> Dean v. Davis, U. S. Adv. Opinions 1916, 130.

And again:

> "To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor, and a consequent diminution of the bankrupt's estate."
>
> Continental, etc. Bank v. Chicago Title, etc. Co., 229 U. S. 435.

As stated by the Circuit Court of Appeals of the Second Circuit:

> "It is not every transfer by an insolvent within the four months' period that is voidable by the Trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property, or when he makes an exchange of property, there is no preference."
>
> Ernst v. M. & M. National Bank (2 C. C. A.), 201 Fed, 664; affirmed 231 U. S. 60.

## V.

**The amendment of 1903 did not make voidable transfers theretofore valid.**

Congress in 1903 amended Section 60a, adding thereto:

> "Where the preference consists in a transfer such period of four months shall not expire until four months

after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The purpose of this amendment was not to make a transfer voidable as a preference which had not been so prior to the amendment, but only to carry forward the four months' period within which a recordable transfer which was in fact preferential might be attacked and set aside by the Trustee. As a transfer for a present consideration was not a preference under the Act as originally adopted, it was not rendered preferential because the Trustee had four months after its record to attach it, provided record was required under the law of the State where executed, instead of four months from the date of its execution.

> In re Watson, 201 Fed. 962; affirmed sub nomine, Deupree *v.* Watson (6 C. C. A.), 216 Fed. 483.

This construction has been generally adopted by the Federal Courts, even in those Circuits in which the Court of Appeals held that the words "if recording is required" referred to the character of the instrument giving the preference without regard to the persons in whose favor the requirement was imposed. We beg to quote from a few of these cases:

From the Sixth Circuit:

> "A chattel mortgage given when the mortgagor was solvent to secure an antecedent debt, but not recorded until after he became insolvent and within four months prior to his bankruptcy, does not constitute a preference under the Bankruptcy Act as amended in 1903, where the withholding from record was not with any fraudulent intent, nor with knowledge of the mortgagor's insolvency, and under the law of the State the failure to record rendered it void only as to subsequent purchasers without notice, and lien creditors, and did not affect its validity as between the parties or as to general creditors. In such case it takes effect as of the date of its execution,

and is to be judged as of that time in determining its voidable character."

In re Klein (6 C. C. A.), 197 Fed. 241.

From the Seventh Circuit:

"Where bankrupts more than two years before bankruptcy, being solvent, in good faith gave to claimant's testator a chattel mortgage to secure their note made for a present and valid consideration, but the mortgage was not recorded until fifteen days prior to the filing of a petition in bankruptcy, and under the law of Illinois such a mortgage although unrecorded is good as against the mortgagor and his general creditors, the recording of the mortgage within the four months' period did not create a preference within the meaning of Section 60a of the Bankruptcy Act."

In re Sturtevant (7 C. C. A.), 188 Fed. 196.

From the Eighth Circuit:

"A contract of conditional sale, although made before but not filed as provided by Kansas statute until within four months prior to the bankruptcy of the purchaser, does not constitute a preference."

Big Four Implement Co. *v.* Wright (8 C. C. A.), 207 Fed. 535, citing Keeble *v.* John Deere Plow Co. (5 C. C. A.), 190 Fed. 1019 and In re Jacobson & Perrill (D. C. Ga.), 200 Fed. 812.

"Where the transfer, when made, was based on a present consideration, delay in recording does not warrant the Court in treating the conveyance as if made as security for an antecedent debt, and a transfer given as security for a present loan is not a voidable preference, though the transfer is not recorded until within four months of the adjudication of the transferrer."

In re Jackson Brick & Tile Co. (D. C. Mo.), 189 Fed. 636.

This was the law as it stood under the amendment of 1903.

## VI.

**The amendment of 1910 changed the rules of evidence, but did not affect the essential nature of preferential transfers, nor extend the time within which they might be attacked.**

On June 25, 1910, subdivision b of Section 60 was again amended, and now reads:

> "If a bankrupt shall * * * * have made a transfer of any of his property, and if, at the time of the transfer * * * * or of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy, or after the filing thereof and before adjudication, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the Trustee, and he may recover the property or its value from such person."

Petitioner insists that this amendment changed the law as it had theretofore existed, and that since the amendment where a transfer is recorded within four months before the filing of the bankruptcy petition, it is voidable, provided the bankrupt be then insolvent and the creditor have reasonable cause to believe that the enforcement of the transfer will effect a preference.

It is to be noted that sub-section a of Section 60 which defines a preference is not changed by the amendment, and as the section is allowed to remain in the Act without modification it would seem that the purpose of Congress was not to

change the meaning of "preference" as it had been defined by this sub-section as construed by the courts. The amendment did not have the effect of making voidable as preferences transfers which before the amendment were not preferential. It is true that since this amendment the intent of the bankrupt to create a preference is no longer necessary, nor is it incumbent upon the Trustee to show that the creditor had reasonable cause to believe that a preference was intended, as was formerly the case. All that is required now is that the bankrupt shall be insolvent, and that the transfer shall operate as a preference, and the person receiving it shall have reasonable cause to believe that it will effect a preference. But, it is submitted that where a transfer is made for a present consideration and in good faith, and the estate of the bankrupt is not diminished thereby, no preference results under the amendment, any more than it did under the Act before it was amended.

Nor does this amendment make any change with regard to the time within which the attack must be made upon an alleged preferential transfer. The language adopted is precisely the same as was inserted in the section by the Act of 1903:

> "If, at the time of the transfer or of the recording or registering of the transfer, if by law recording or registering thereof is required."

These words had been construed by the courts before the amendment of 1910 and had acquired a definite meaning. Therefore, Congress, when it adopted the words, must have done so with the full understanding of their meaning as construed by the courts. What basis is there, therefore, for the position of petitioner that since the amendment a transfer, which under the Act as amended in 1903 was not preferential, is made a preference by this amendment of 1910? Under the amendment of 1903 the Trustee had four months from the date of the transfer or from the date of the recording or

registering "if by law such recording or registering is required" to attack the transfer, and under the amendment of 1910 he is given precisely the same time, the identical language being used in both Acts. True, under the amendment of 1903 he was required to show that the bankrupt intended a preference, and that the creditor had reasonable cause to believe that a preference was intended. Since the amendment of 1910 all he is required to show is that the bankrupt was insolvent, that the effect of the transfer would be to create a preference, and that the creditor has reasonable cause to believe that a preference will result from the transfer. But these are differences of proof, and have no reference to the time within which the attack must be made. The attack now, as under the amendment of 1903, must be made within four months from the date of the transfer, unless by the laws of the State the transfer is required to be recorded or registered.

The most comprehensive and satisfactory discussion of Section 60a and b, and of the effect to be given to the amendments of 1903 and 1910, which we have found is the able and exhaustive opinion of Judge Cochran, of the Eastern District of Kentucky, taking the same position we have contended for in this brief. Quoting the syllabus:

> "The only effect of the amendment of Bankr. Act, July 1, 1898, by Act Feb. 5, 1903, by the addition of the provision that, 'where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required,' was to carry forward the four months' period within which a recordable transfer which was in fact preferential might be attacked as voidable under subdivision 'b,' leaving the question whether or not the transfer constituted a voidable preference to be determined as of the date when it was actually made; and a transfer which was then made for a present consideration and was not therefore preferential, does not be-

come so because of delay in recording. Nor did the amendment of Act July 1, 1898, by Act June 25, 1910, change the effect of the act in that respect, it being essential to a preferential transfer, both before and after the amendment, that it should have been to or for the benefit of a pre-existing creditor who thereby gained an advantage over other creditors."

In re Watson (D. C. Ky.), 201 Fed., 962.

This case was affirmed in all respects by the Circuit Court of Appeals for the Sixth Circuit. The Court cited with approval the opinion of Judge Dyer In re Jackson Brick & Tile Co., *supra*, and concludes:

"He was of opinion that the statute ought not to be construed in such a way as to create a transaction different from what it actually was. We are of the same opinion, and follow here the decision of this Court on the same subject in the case In re Klein."

Deupree v. Watson (6 C. C. A.), 216 Fed., 483, 490.

While leaving the question open, the Circuit Court of Appeals for the Seventh Circuit evidently takes this view of the Amendment of 1910. After referring to its decision In re Sturtevant, 188 Fed. 196, *supra*, in which it was held that "a transfer for a present consideration can never be a preference within Section 60a, and therefore cannot be voidable as such under Section 60b," the Court (speaking through Mack, C. J.) says:

"Whether, under the 1910 amendment of Section 60b (Section 60a, defining a preference, is unchanged), not only a mortgage, voidable as a preference when executed (Carey v. Donohue, 209 Fed. 329), and one given to secure a pre-existing debt, but, as in the Klein case, 192 Fed. 241, not voidable when executed, but also a mortgage given for a present consideration, executed before, but recorded within, the four months period, can

be attacked under Section 60b, as held in Brigman *v.* Covington, 219 Fed. 500 (C. C. A. 4th Circuit), *contra,* Anderson *v.* Chenault, 208 Fed. 400 (C. C. A. 5th Circuit), and In re Watson (D. C.), 201 Fed. 962 (affirmed on other grounds in 216 Fed. 483),—we need not now determine, because, in our judgment, nothing that was done before the four months' period amounted to a complete transfer for a present consideration."

In re Caslon Press (7 C. C. A.), 229 Fed. 133.

## VII.

### Bailey v. Baker Ice Machine Company, 239 U. S. 268.

The decision in this case fully supports, we think, the position which we have taken in this brief. The Court was considering the question, whether the recording within the four months' period, and at a time when the maker was insolvent, of a conditional sale given prior to the four months constituted a preference under Section 60 as amended. Quoting from the opinion:

> "The section leaves no doubt that to be within its terms the transfer must be one which a bankrupt makes of his own property and which operates to prefer one creditor over others; and if further light be needed there is a declaration in the bankruptcy act (Sec. 1, clause 25) that the word 'transfer' shall be taken to include every mode 'of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.' (30 Stat. at L. 545, chap. 541, Comp. Stat. 1913, Sec. 9585.) It therefore is plain that Sec. 60b refers to an act on the part of a bankrupt whereby he surrenders or encumbers his property or some part of it for the benefit of a particular creditor, and thereby diminishes the estate which the bankruptcy act seeks to apply for the benefit of all the creditors. New York County Nat. Bank *v.* Massey, 192 U. S. 138, 147, 48 L. Ed. 380, 384, 24 Sup. Ct.

Rep. 199. Applying this test to the contract in question, we think it did not operate as a preferential transfer by Grant Brothers, the bankrupts. The property to which it related was not theirs, but the Baker Company's. The ownership was not transferred, but only the possession, and it was transferred to the bankrupts, not from them. Being only conditional purchasers, they were not to become the owners until the condition was performed. No doubt the right to perform it and thereby to acquire the ownership was a property right. But this right was not surrendered or encumbered. On the contrary, it remained with the bankrupts and ultimately passed to the trustee, who was free to exercise it for the benefit of the creditors. So, there was no diminution of the bankrupt's estate."

The Court then refers to the fact that under the recording Statute of Kansas a contract of conditional sale is valid between the parties whether filed for record or not, but is void as against a creditor or vendee who fastens a lien upon the property by execution, attachment, or like process before the contract is filed for record. After commenting on the fact that the contract, though made in October, was not filed for record until the following May, the opinion continues:

"In the meantime no creditor fastened a lien upon the property by execution, attachment or other legal process."

The Court then disposes of the contention that Section 47a as amended in 1910 conferred upon the Trustee the status of a lien creditor, saying that such lien only dates from the time of the filing of the petition.

This decision is a complete answer to petitioner's contention that "the date of record is the time of transfer," and if no consideration be then paid the transfer is a preference. Petitioner's argument is that by Section 47a as amended the Trustee is given the status of a lien creditor. A mortgage to be effective against a lien creditor must be recorded. There-

fore, a mortgage is "required to be recorded" under Section 60.

The Georgia statute as to recording conditional sale contracts is the same as that governing the record of mortgages;* and

> "the effect of failure to record a contract of conditional sale is the same as in failing to record a mortgage."
>
> Cottrell *v.* Merchants Bank, 89 Ga., 508, 515.
> Rhode Island Locomotive Works *v.* Empire Lumber Co., 91 Ga. 639.

The Kansas statute which the Court considered in the Bailey case is the same, in effect as this statute of Georgia. And it was held that recording the contract within four months of bankruptcy did not make the contract a preference because "there was no diminution of the bankrupt's estate," it did not 'operate to prefer one creditor over others.' In other words, the recording of an instrument which is not a preference at the time of its execution will not convert it into a preference. As a mortgage for a present consideration does not diminish the bankrupt's estate and does not secure a creditor at the expense of other creditors, its record, under the authority of the Bailey case, would not change its character and render it preferential. The Trustee under Section 47a as amended obtained no greater rights than those which would have been acquired by creditors who might have secured a lien by attachment or otherwise on the day of the filing of the petition in bankruptcy, and therefore the Trustee's lien is junior to the lien of the mortgage.

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*The statute is as follows:
Conditional bills of sale must be recorded within 30 days from their date and in other respects shall be governed by the laws relating to the registration of mortgages.
Park's Ann. Code, § 3319 (Code, 1910, same section).

We respectfully insist, therefore, that as a mortgage is valid in Georgia as to the mortgagor and general creditors, though unrecorded, and is only postponed as to lienors and purchasers without notice, it is not "required to be recorded" within the meaning of Section 60 of the Bankruptcy Act; that having been given for a present consideration it is not a preference and its record though within four months of bankruptcy does render it preferential; and that whatever doubt may have existed as to either of these propositions has been resolved in favor of respondent by the decisions of this Court in Carey *v.* Donohue and Bailey *v.* Baker Ice Machine Co., both of which were rendered since the petition for *certiorari* was granted.

Respectfully submitted,

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